

No. 11761

United States
Circuit Court of Appeals
For the Ninth Circuit

HERMAN H. HELBUSH and MONOGRAM
MANUFACTURING CO., a corporation,
Appellants,

vs.

DONALD H. FINKLE, doing business as Wedge-
lock Company,
Appellee.

Transcript of Record
VOLUME I
Pages 1 to 276

Upon Appeal from the District Court of the United States
for the Southern District of California
Central Division

FILED

JAN 30 1948

PAUL P. O'BRIEN, CLERK

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF ATTORNEYS

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For Appellants.

LYON & LYON,
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811 West 7th St.,
Los Angeles 14, Calif.,
For Appellee.

In the United States District Court, Southern
District of California, Central Division

Civil Action No. 5453 O'C

HERMAN H. HELBUSH and
MONOGRAM MANUFACTURING CO.,
a Corporation,

Plaintiffs,

vs.

DONALD H. FINKLE, Doing Business as
WEDGELOCKE COMPANY,
Defendant.

COMPLAINT FOR INFRINGEMENT OF
UNITED STATES LETTERS PATENTS

Nos. 2,320,493, 2,364,408 and 2,365,787

Plaintiffs complain of defendant and allege:

I.

That plaintiff, Herman H. Helbush, is a resident of Los Angeles, County of Los Angeles, State of California, within the Southern District of California, Central Division;

That plaintiff, Monogram Manufacturing Co., is a California corporation maintaining a regular place of business in the County of Los Angeles, State of California, within the Southern District of California, Central Division;

II.

That defendant, Donald H. Finkle, is a resident of and maintains a regular place of business, under

the name and style of [2*] Wedgeloek Company, in the County of Los Angeles, State of California, within the Southern District of California, Central Division.

III.

That jurisdiction of this Court arises under the patent laws of the United States because of infringement of United States Letters Patents Nos. 2,320,493, 2,364,408 and 2,365,787 by defendant, which infringement has been and is being carried out by defendant within the Southern District of California, Central Division and elsewhere in the United States.

IV.

That on June 1, 1943, United States Letters Patent No. 2,320,493 was duly and legally issued to plaintiff, Herman H. Helbush, for an invention in Clamp.

V.

That on December 5, 1944, United States Letters Patent No. 2,364,408 was duly and legally issued to plaintiff, Herman H. Helbush, for an invention in Sheet Metal Clamp.

VI.

That on December 26, 1944, United States Letters Patent No. 2,365,787 was duly and legally issued to plaintiff, Herman H. Helbush, for an invention in Clamp.

VII.

That since the respective dates of issuance of

* Page numbering appearing at foot of page of original certified Transcript of Record.

said United States Letters Patents Nos. 2,320,493, 2,364,408 and 2,365,787 plaintiff, Herman H. Helbush, has been and still is the owner thereof and plaintiff, Monogram Manufacturing Co., possesses an exclusive license to manufacture, use and sell devices covered by said Letters Patents, and has been and still is engaged in the active manufacture and sale thereof and has at all times been able to supply the demand therefor. [3]

VIII.

That defendant has for some time past, and still is, infringing claims 1 to 7, inclusive, of said Letters Patent No. 2,320,493, claims 1 and 2 of said Letters Patent No. 2,364,408, and claim 11 of said Letters Patent No. 2,365,787, by making, using and selling clamp devices embodying the inventions patented thereby and will continue to do so unless enjoined by this Court.

IX.

That plaintiff, Monogram Manufacturing Co., has placed the required statutory notice on all devices manufactured and sold by it under said respective Letters Patents.

X.

That defendant's said infringing acts have been and are wilful and deliberate.

Wherefore, plaintiffs pray:

1. For a preliminary and final injunction against further infringement by defendant and those controlled by defendant.

2. For an accounting of profits and damages arising out of or caused by said infringements.
3. For the trebling of damages suffered by plaintiffs by virtue of said deliberate and wilful infringement.
4. For plaintiffs' costs incurred herein.
5. For such other relief as to the Court may seem just and proper in the premises. [4]

Dated this 24th day of May, 1946.

HERMAN H. HELBUSH,
MONOGRAM MANUFACTUR-
ING CO., a Corporation,
Plaintiffs,

By MASON & GRAHAM,
/s/ COLLINS MASON,
Attorneys for Plaintiffs.

Verification

State of California,
County of Los Angeles—ss.

Herman H. Helbush, being by me first duly sworn, deposes and says: that he is one of the plaintiffs in the above-entitled action; that he has read the foregoing complaint and knows the contents thereof; and that the same is true of his own knowledge, except as to the matters which are therein stated upon

information or belief, and as to those matters that he believes it to be true.

/s/ HERMAN H. HELBUSH.

Subscribed and sworn to before me this 24th day of May, 1946.

[Seal] /s/ LINNE CORD,
Notary Public in and for said County and State.
My Commission Expires Feb. 17, 1947.

[Endorsed]: Filed Jan. 10, 1946. [5]

[Title of District Court and Cause.]

AMENDED ANSWER TO COMPLAINT
AND COUNTERCLAIM

Comes now the defendant, Donald H. Finkle, doing business as Wedgelock Company, and with regard to the Complaint filed herein answers, denies and alleges as follows:

1.

Answering Paragraphs I, II and III of said Complaint, defendant admits all the allegations thereof except that he specifically denies any acts of infringement have been committed by said defendant.

2.

Answering Paragraphs IV, V and VI, defendant denies each and every allegation thereof and leaves plaintiffs to their proofs thereof. [6]

3.

Answering Paragraph VII, defendant is without knowledge of the facts therein alleged and therefore denies said facts and leaves plaintiffs to their proofs thereof.

4.

Answering Paragraphs VIII, IX and X, defendant denies each and every allegation thereof and leaves plaintiffs to their proofs thereof.

Further answering said Complaint herein and for separate, alternate and further defenses, defendant alleges:

5.

That pretended Letters Patent Nos. 2,320,493, 2,364,408 and 2,365,787 were not granted by the Commissioner of Patents within the authority granted him under due form of law or after due proceedings were had with respect to the applications filed by or on behalf of Frank C. Wallace; that said pretended Letters Patent were irregularly granted without proper or due consideration of the applications for said pretended Letters Patent.

6.

That defendant has not infringed said pretended Letters Patent or any claim or claims thereof.

7.

That Frank C. Wallace was not the original or first inventor of that which is alleged to be patented in said pretended Letters Patent Nos. 2,320,493, 2,364,408 and 2,365,787 in suit, or any material or

substantial part thereof, but on the contrary, prior to the supposed invention thereof the thing or things alleged to be patented by said pretended Letters Patent, and particularly that which is described in the pretended claims thereof, and all material and substantial parts thereof, have been [7] patented or described in each of the following Letters Patent, or the applications therefor, and that the description contained in said pretended Letters Patent and each and all of the pretended claims thereof had been published as a printed publication, the numbers of said prior Letters Patent, the names of the patentees thereof and the dates of said Letters Patent being as follows:

United States Letters Patent

Patentee	Number	Date
De Mooy.....	2,159,655	May 23, 1939
De Mooy.....	2,269,188	Jan. 6, 1942
Wallace	2,266,929	Dec. 23, 1941
Wallace	2,271,879	Feb. 3, 1942
Roe	2,188,450	Jan. 30, 1940
Webb	2,256,634	Sept. 23, 1941
Rogers	2,276,344	Mar. 17, 1942

British Letters Patent

A.T.S. Company	413,403	Feb. 7, 1934
Roeroy	443,683	Mar. 4, 1936

and further Letters Patent which this defendant has not yet located and for which this defendant is diligently searching and prays leave to add to this answer.

8.

Defendant further alleges upon information and belief that prior to any supposed invention or dis-

covery by Herman H. Helbush, that which is alleged to be patented in and by the pretended Letters Patent 2,320,493 2,364,408 and 2,365,787, and particularly that which is described and claimed therein, and all material and substantial parts thereof, had in the United States been invented, used by, or known to, each of the persons whose names, places of invention, knowledge of use and residences are as follows:

(a) Each and every patentee mentioned in the preceding [8] paragraph, residing at the places indicated in the respective patents and at the places stated as the places of residence of the respective patentees;

(b) Donald H. Finkle, George H. Finkle, Ralph H. Head and Hiram Stewart Clark, all of Los Angeles, California; and others whose names and addresses this defendant has not yet learned and for which this defendant is diligently searching and prays leave to add to this answer.

9.

That in view of the state of the art at and before the alleged invention or inventions of the pretended Letters Patent Nos. 2,320,493, 2,364,408 and 2,365,787, or attempted to be defined in the claims, or any claim of said pretended Letters Patent, said claims or any of them cannot now be so interpreted as to bring within their purview as an infringement thereof any clamp manufactured or sold by defendant.

10.

That while the alleged applications for the pretended Letters Patent Nos. 2,320,493, 2,364,408 and 2,365,787 were pending in the United States Patent Office, the applicant therefor so limited and confined the claims of said alleged applications under the requirements of the Commissioner of Patents that plaintiff cannot now seek for or obtain a construction for any claim of said pretended Letters Patent sufficiently broad to cover any fastener manufactured or sold by defendant.

11.

That defendant further alleges that the alleged invention of pretended Letters Patent Nos. 2,320,493, 2,364,408 and 2,365,787, in view of the state of the art as it existed at the date of the alleged invention or inventions, does not involve invention or contain any patentable novelty but consists in the mere adaptation of well-known methods, devices and compositions of matter for the required [9] uses involving merely the skill expected of one in the art to which said pretended Letters Patent pertains.

12.

That defendant further alleges that the description of the alleged invention or inventions of the specifications of the pretended Letters Patent Nos. 2,320,493, 2,364,408 and 2,365,787 is not in such full, clear, concise and exact terms as to enable any person skilled in the art or science to which it pertains, or with which it is most clearly connected, to make, compound or use the same.

Counterclaim

Counterclaim complains of counter defendant and alleges:

A.

That counter claimant Donald H. Finkle is a resident of and maintains a regular place of business under the name and style of Wedgelock Company in the County of Los Angeles, State of California, within the Southern District of California, Central Division.

B

That counter defendant Herman H. Helbush is a resident of Los Angeles, County of Los Angeles, State of California, within the Southern District of California, Central Division.

C.

That counter defendant Monogram Manufacturing Co. is a California corporation maintaining a regular place of business in the County of Los Angeles, State of California, within the Southern District of California, Central Division.

D

That jurisdiction of this Court arises under the patent laws of the United States because of infringement of United States Letters Patent No. 2,393,088 by counter defendants, which infringement has been and is being carried out by counter defendants within the Southern District of California, Central Division, and elsewhere [10] in the United States.

E

That on January 15, 1946, United States Letters Patent No. 2,393,088 was duly and legally issued to Hiram Stewart Clark and Carlos S. Head for an invention in fasteners.

F

That counter claimant is the owner of said Letters Patent No. 2,393,088 and has been and still is engaged in the active manufacture and sale of fasteners described and claimed in said Letters Patent and has at all times been able to supply the demand therefor.

G.

That counter defendants have for some time past, and still are, infringing Claims 1 to 8, inclusive, of said Letters Patent No. 2,393,088 by making, using and selling fastener devices embodying the invention patented thereby, and will continue to do so unless enjoined by this Court.

H.

That counter claimant has placed the required statutory notice on all devices manufactured and sold by him under said Letters Patent.

I.

That counter defendants' said infringing acts have been and are wilful and deliberate.

Wherefore, defendant-counter claimant prays:

1. That a decree be issued out of this Court decreeing said Letters Patent Nos. 2,320,493, 2,364,408 and 2,365,787 and the respective claims thereof invalid and void.

2. That a decree be issued out of this Court decreeing that the defendant has not infringed any claim of said pretended Letters Patent Nos. 2,320,493, 2,364,408 and 2,365,787.

3. That defendant be awarded its costs herein.

4. For a preliminary and final injunction against the plaintiffs, their agents and representatives, from further representing to the trade and particularly to defendant's customers that clamps manufactured by defendant are an infringement of, and that any use by said trade or customers is an infringement of, said pretended Letters Patent Nos. 2,320,493, 2,364,408 and 2,365,787, and that damages be awarded defendant because of plaintiffs' representations to the trade and to defendant's customers.

5. For a preliminary and final injunction against further infringement by counter defendants, or those controlled by counter defendants, of counter claimant's Letters Patent No. 2,393,088.

6. For an accounting of profits or damages arising out of or caused by said infringement, for the trebling of damages suffered by counter claimant by virtue of said wilful and deliberate infringement, for counter claimant's costs incurred herein, and

for such other relief as to the Court may seem just and proper in the premises.

Dated at Los Angeles, California, this 12th day of September, 1946.

LYON & LYON,
/s/ FREDERICK W. LYON,
Attorneys for Defendant-
Counter Claimant.

It Is Hereby Stipulated by and between counsel for the respective parties that the above Amended Answer to Complaint and Counterclaim may be filed in this case.

/s/ FREDERICK W. LYON,
/s/ COLLINS MASON.

Approved and so ordered, this Sept. 13th, 1946.

/s/ PAUL J. McCORMICK,
Judge.

[Endorsed]: Filed Sept. 13, 1946. Edmund L. Smith, Clerk, by E. M. Enstrom, Jr., Deputy Clerk.

[Title of District Court and Cause.]

ANSWER TO AMENDED
COUNTERCLAIM

Comes now the plaintiffs and for answer to defendant's amended counterclaim admit, deny and allege as follows:

I.

Admit the allegations of paragraphs A, B and C.

II.

Answering paragraph D, admit that jurisdiction of this Court arises under the patent laws of the United States, but deny each and every remaining allegation of said paragraph.

III.

Answering paragraph E, admit that United States Letters Patent No. 2,393,088 issued to Hiram Stewart Clark and Carlos S. Head on January 15, 1946, but deny that the same was duly or legally issued. [13]

IV.

Plaintiffs are without knowledge, information or belief as to the allegations of paragraph F and therefor deny the same.

V.

Deny each and every of the allegations of paragraphs G, H and I.

VI.

Further answering said counterclaim, plaintiffs allege that said United States letters patent No. 2,393,088 and each and every claim thereof is invalid and void because:

(a) The alleged invention described and claimed therein does not constitute patentable novelty within the meaning of the patent law in view of the prior state of the art to which

the subject matter relates and in view of what was common knowledge on the part of those skilled in the art all prior to the date of the said alleged invention;

(b) The alleged invention or improvement and all material and substantial parts thereof claimed as new in said Letters Patent No. 2,393,088 was, before the alleged invention or discovery thereof by said Hiram Stewart Clark and Carlos S. Head, known to others and, more than one year prior to the filing of their application for said patent, was described and patented in United States Letters Patent as follows, to-wit: [14]

2,161,464	June 6, 1939	G. F. L. Gilbert
2,248,882	July 8, 1941	E. B. Lear
2,256,243	Sept. 16, 1941	R. W. Edwards
2,271,012	Jan. 27, 1942	J. H. Hutchings
2,276,344	Mar. 17, 1942	G. D. Rogers
2,292,498	Aug. 11, 1942	F. C. Wallace
2,356,619	Aug. 26, 1944	J. Rossi et al.
2,369,410	Feb. 13, 1945	P. R. Rossman

and in other Letters Patent which are at present unknown to plaintiffs but for which they are diligently searching and, when found, they will pray leave to insert in this answer;

(c) The said alleged invention or improvement or all material and substantial parts thereof claimed as new in said Letters Patent No. 2,393,088 had been in public use or on sale in this country for more than one year prior to the original application for said Letters Patent by the parties named in the patents enumerated

in paragraph (b) hereof, at the places named in the said patents as being the residences of the respective parties, and by the following persons or firms;

Monogram Manufacturing Co., Los Angeles, California,

Scovill Manufacturing Co., Waterbury, Connecticut.

(d) The said alleged invention or improvement or all material and substantial parts thereof claimed as new in said Letters Patent No. 2,393,088 was known and used by others in this country before the alleged invention thereof by the said Hiram Stewart Clark and Carlos S. Head, by persons and firms whose names and places of residence or use are specified in paragraphs (b) and (c) hereof and by others whose names and places of residence are at present unknown to plaintiffs but for which they are diligently searching and, when found, they will pray leave to insert in this answer. [15]

VII.

Further answering said counterclaim, plaintiffs allege that in view of the state of the art at and before the alleged invention of said Letters Patent No. 2,393,088, or attempted to be defined in the claims thereof, said claims cannot now be so interpreted as to bring within their purview as an infringement thereof any device manufactured or sold by plaintiffs or either of them.

VIII.

Further answering said counterclaim, plaintiffs allege that while the application for said Letters Patent No. 2,393,088 was pending in the United States Patent Office, the applicants therefor so limited and confined the claims thereof under the requirements of the Commissioner of Patents that counter claimant cannot now seek for or obtain a construction for any claim of said Letters Patent sufficiently broad to cover any device manufactured or sold by plaintiffs or either of them.

IX.

Further answering said counterclaim, plaintiffs further allege that the description of the alleged invention of said Letters Patent No. 2,393,088 is not in such full, clear, concise and exact terms as to enable any person skilled in the art to which it relates, or with which it is connected, to make or use the same.

Wherefore, plaintiffs-counter defendants pray:

1. For a decree dismissing plaintiffs counterclaim.
2. For a decree adjudging United States Letters Patent No. 2,393,088 and each and every of the claims thereof, invalid and void. [16]
3. For a decree adjudging that plaintiffs have not infringed any claim of said United States Letters Patent No. 2,393,088.
4. For a decree awarding plaintiffs their costs herein.

5. For a decree granting to plaintiffs such other and further relief as may be just and equitable.

Dated at Los Angeles, California, this 20th day of September, 1946.

MASON & GRAHAM,
/s/ COLLINS MASON,
Attorneys for Plaintiffs-
Counter Defendants.

[Endorsed]: Filed Sept. 23, 1946. [17]

[Title of District Court and Cause.]

DISMISSAL

It Is Hereby Stipulated, by and between the parties to this action, through their respective attorneys, that this action may be and the same is hereby dismissed without prejudice and without costs as to plaintiffs' United States Letters Patent in suit No. 2,320,493 and as to defendant's counterclaim for infringement of United States Letters Patent No. 2,393,088.

Dated this 15th day of January, 1947.

MASON & GRAHAM,
/s/ C. W. MASON,
Attorneys for Plaintiffs.

LYON & LYON,
/s/ FREDERICK W. LYON,
Attorneys for Defendant.

It Is So Ordered this 22 day of January, 1947.

/s/ J. F. T. O'CONNOR,
U. S. District Judge.

Judgment entered and docketed Jan. 22, 1947.
Book 41, Page 425.

[Endorsed]: Filed Jan. 22, 1947.

[Title of District Court and Cause.]

STIPULATION

The parties hereto, through their respective attorneys, hereby stipulate that the annexed supplemental complaint of plaintiffs herein shall be filed herein pursuant to order of Court made during the trial of this action.

It is further stipulated that it may be deemed that defendant, Wedgelock Company, a corporation, named as a defendant in said supplemental complaint, has answered said supplemental complaint denying that it has infringed, is infringing or intends to continue to infringe claim 11 of United States Letters Patent in suit No. 2,365,787 or claims 1 and 2 of United States Letters Patent in suit No. 2,364,408, and incorporating paragraphs numbered 7 to 12, inclusive, as well as the prayer, of the amended answer of defendant, Donald H. Finkle, doing business as Wedgelock Company, heretofore [19] filed herein, insofar as said answer relates to said claims of the hereinabove identified United States Letters Patents in suit.

Dated this 24th day of January, 1947.

MASON & GRAHAM,

/s/ C. W. MASON,

Attorneys for Plaintiffs.

LYON & LYON,

/s/ FREDERICK W. LYON,

Attorneys for Defendant.

It Is So Ordered this 5 day of February, 1947.

/s/ J. F. T. O'CONNOR,

Judge.

[Endorsed]: Filed Feb. 5, 1947.

[Title of District Court and Cause.]

SUPPLEMENTAL COMPLAINT FOR IN-
FRINGEMENT OF UNITED STATES
LETTERS PATENTS NOS. 2,365,787
(CLAIM 11) AND 2,364,408 (CLAIMS 1
AND 2)

Plaintiffs, Herman H. Helbush, a resident of Los Angeles, County of Los Angeles, State of California, and Monogram Manufacturing Company, a California corporation having a regular place of business in the County of Los Angeles, State of California bring this their supplemental complaint against Wedgelock Company, a corporation of California and a citizen of said state, and allege:

1. That said defendant, Wedgelock Company, is a corporation organized and existing under the laws of the State of California, is a citizen of said state, and has a regular place of business in the City of Los Angeles, County of Los Angeles, State of California. [21]

2. That on June 10, 1946, plaintiffs filed their original complaint herein against Donald H. Finkle, doing business as Wedgelock Company, charging said defendant with infringement of claim 11 of United States Letters Patent No. 2,365,787 and claims 1 and 2 of United States Letters Patent No. 2,365,408, and praying for an injunction against further infringement thereof and for an accounting of profits and damages accruing to plaintiffs by reason of such infringement.

3. That said defendant, Wedgelock Company, a corporation, was organized in or about the month of January, 1947, subsequent to the filing of the original complaint herein; that said defendant, Wedgelock Company, a corporation, did, on or about said date, acquire the assets, property and business of said Donald H. Finkle, doing business as Wedgelock Company, theretofore employed by said defendant, Donald H. Finkle, doing business as Wedgelock Company, in carrying out the infringement alleged by said original complaint, and said defendants, Wedgelock Company, a corporation, has since conducted, is now conducting and threatens to continue to conduct the said business formerly carried on by said defendant, Donald H. Finkle, doing business as Wedgelock Company.

4. That said defendant, Wedgelock Company, a corporation, has infringed, is now infringing and threatens to continue to infringe upon said claims of said Letters Patents and each thereof by making, using and selling clamp devices embodying the inventions thereof.

5. That said defendant, Wedgelock Company, a corporation, has assumed and conducted the defense of said action against said defendant, Donald H. Finkle, doing business as Wedgelock Company.

6. That plaintiffs are informed and believe and therefore allege that they are entitled to the same relief against the said [22] Wedgelock

Company, a corporation, as they might have had if the facts herein above stated and charged by way of supplement had been stated in plaintiff's said original complaint.

Wherefore, plaintiffs pray:

1. For a preliminary and final injunction against further infringement by said defendant, Wedgeloek Company, a corporation and those controlled by it.

2. For an accounting of profits and damages arising out of or caused by said infringement.

3. For the trebling of damages suffered by plaintiffs by virtue of said deliberate and wilful infringement.

4. For plaintiffs' costs incurred herein.

5. For such further relief as to the Court may seem just and proper in the premises.

Dated this 24th day of January, 1947.

H. H. HELBUSH,
MONOGRAM MAUNFACTUR-
ING CO, a corporation,

By MASON & GRAHAM,
/s/ C. W. MASON,
Attorneys for Plaintiffs.

[Endorsed]: Filed Feb. 5, 1947.

At a stated term, to wit: The February Term. A. D. 1947, of the District Court of the United States of America, within and for the Central Division of the Southern District of California, held at the Court Room thereof, in the City of Los Angeles, on Tuesday, the 18th day of February in the year of our Lord one thousand nine hundred and forty-seven.

Present: The Honorable J. F. T. O'Connor,
District Judge.

[Title of Cause.]

Minute Order, February 18, 1947

PREPARE FINDINGS OF FACT,
CONCLUSIONS OF LAW AND JUDGMENT

This case having come before the Court for trial and ordered submitted, upon consideration whereof the Court now finds that the defendant has not infringed. Counsel for the defendant, F. W. Lyon, Esq., is ordered to prepare findings of fact and conclusions of law and judgment within ten days.

[Title of District Court and Cause.]

FINDINGS OF FACT AND
CONCLUSIONS OF LAW

This cause came on for trial and the court, having heard the evidence and considered the stipulation of the parties, finds the facts and states the conclusions of law as follows:

1. That plaintiff, Herman H. Helbush is a resi-

dent of Los Angeles, County of Los Angeles, State of California, within the Southern District of California, Central Division.

2. That plaintiff, Monogram Manufacturing Co., is a California corporation, maintaining a regular place of business in the County of Los Angeles, State of California, within the Southern District of California, Central Division.

3. That defendant, Donald H. Finkle, is a resident of and has maintained a regular place of business under the name and style of Wedglock Company, in the County of Los Angeles, State of California, within the Southern District of California, Central Division. [25]

4. That defendant, Wedglock Company, is a corporation, organized and existing under the laws of the State of California, is a citizen of said state and has a regular place of business in the city of Los Angeles, County of Los Angeles, State of California, and within the Southern District of California, Central Division.

5. That the defendant, Wedglock Company, a corporation, was organized on or about the 1st day of January, 1947, subsequent to the filing of the original complaint herein and did, on or about said date, acquire the aforesaid property and business of said Donald H. Finkle, doing business as Wedglock Company, and has since conducted and is now conducting said business.

6. That Herman H. Helbush, plaintiff herein, has been, and still is, the owner of all right and title to the United States Letters Patent No. 2,364,408.

7. That Herman H. Helbush, plaintiff herein, has been, and still is, the owner of all right and title to the United States Letters Patent No. 2,365,787.

8. That Monogram Manufacturing Co., plaintiff herein, has the exclusive right to manufacture, sell and use the invention of said United States Letters Patent No. 2,364,408.

9. That Monogram Manufacturing Co., plaintiff herein, has the exclusive right to manufacture, sell and use the invention of said United States Letters Patent No. 2,365,787.

10. That defendant, Donald H. Finkle, has been engaged in the manufacture and sale of sheet metal clamps or clamps prior to and subsequent to the issuance of said Letters Patent.

11. That the defendant, Wedglock Company, a corporation, has been engaged in the manufacture and sale of sheet metal clamps or clamps, subsequent to the issuance of said Letters Patent.

12. That Donald H. Finkle, defendant, has not infringed United States Letters Patent No. 2,364,408.

13. That Donald H. Finkle, defendant, has not infringed [26] United States Letters Patent No. 2,365,787.

14. That Wedglock Company, a corporation, has not infringed United States Letters Patent No. 2,364,408.

15. That Wedglock Company, a corporation, has not infringed United States Letters Patent No. 2,365,787.

16. That United States Letters Patent No. 2,365,787 discloses a clamp which includes a combination of: a longitudinally split pin mounted in a body to reciprocate through a hole in an end wall of the body, a spring urging the pin inwardly of the body, a T-shaped spreader having its cross portion mounted between the legs of said split pin upon the outer end wall of the body, and a cap attached to the side walls and extending over the end wall of the body to hold the T-shaped spreader in position on the outside of the end wall.

17. That United States Letters Patent No. 2,365,787 were issued by the Patent Office only after the applicant therefor had limited said patent to a construction in which the body member has an integral end wall and with a hole therethrough for the passage of the split pin and a cover cap over this end wall to hold a T-shaped spreader in position between said cap and said end wall.

18. That British Patent No. 413,403, issued to A. T. S. Company, February 7, 1934, describes and illustrates a clamp for the same purpose and with identical mechanical construction as United States Letters Patent No. 2,365,787, except that said British patent does not describe an end cap for holding a T-shaped spreader on the outside of an end wall of the body of said clamp and against the end wall.

19. That British Patent No. 443,683, issued to Rocroy Company, July 2, 1935, describes and illustrates a clamp for the same purpose and with identical mechanical construction as United States Letters Patent No. 2,365,787, except that said Brit-

ish patent does not describe an end cap for holding a T-shaped spreader on the outside [27] of an end wall of the body of said clamp and against the end wall.

20. That United States Letters Patent No. 2,136,875, issued to Blanc, November 15, 1938, describes and illustrates a clamp for the same purpose and with identical mechanical construction as United States Letters Patent No. 2,365,787, except that United States Letters Patent No. 2,136,875 does not describe an end cap for holding a T-shaped spreader on the outside of an end wall of the body of said clamp and against the end wall.

21. That United States Letters Patent No. 2,159,655, issued to De Mooy, May 23, 1939, describes and illustrates a clamp for the same purpose and with identical mechanical construction as United States Letters Patent No. 2,365,787, except that United States Letters Patent No. 2,159,655 does not describe an end cap for holding a T-shaped spreader on the outside of an end wall of the body of said clamp and against the end wall.

22. That United States Letters Patent No. 2,269,188, issued to De Mooy, January 6, 1942, describes and illustrates a clamp for the same purpose and with identical mechanical construction as United States Letters Patent No. 2,365,787, except that United States Letters Patent No. 2,269,188 does not describe an end cap for holding a T-shaped spreader on the outside of an end wall of the body of said clamp and against the end wall.

~~23. That in view of the above set forth prior patents, and the ruling of the Patent Office as above set forth, the patent in suit, United States Letters Patent No. 2,365,787, must be limited in its scope to include a body member with an integral end wall and a cover cap surrounding said end wall and holding a T-shaped spreader on the outside of said end wall and inside of said cover cap.~~

~~(O'Connor, Judge)~~

24. That the clamps manufactured, used and sold by the defendants, Donald H. Finkle and the Wedglock Company, a corporation, [28] do not include an end cap for holding a T-shaped spreader on the outside end wall of the body of said clamp and against the end wall.

25. That the clamps manufactured, used, and sold by defendants have a two-piece body with the T-shaped spreader positioned inside of the body.

~~26. That the method of assembly of defendants' clamps is totally different from any manner of assembly possible in United States Letters Patent No. 2,365,787.~~

27. That United States Letters Patent No. 2,364,408 discloses a clamp which differs from United States Letters Patent No. 2,365,787 only in the provision of a shoulder on the body and an interlocking shoulder on the plunger attached to the longitudinally split pin to prevent the split pin and plunger from being hurled from the body upon breaking of the split pin.

28. That British Patent No. 413,403, issued to ~~A. T. S. Company, February 7, 1934, describes and~~

Illustrates a clamp (for the same purpose and with identical mechanical construction as) United States Letters Patent No. 2,364,408, except that said British patent does not describe the interlocking shoulder and does not describe an end cap for holding a T-shaped spreader on the outside of an end wall of the body of said clamp and against the end wall.

29. That British Patent No. 443,683, issued to Rocroy Company, July 2, 1935, describes and illustrates a clamp for the same purpose and with identical mechanical construction as United States Letters Patent No. 2,364,408, except that said British patent does not describe the interlocking shoulder and does not describe an end cap for holding a T-shaped spreader on the outside of an end wall of the body of said clamp and against the end wall.

30. That United States Letters Patent No. 2,136,875, issued to Blanc, November 15, 1938, describes and illustrates a clamp for the same purpose and with identical mechanical construction as [29]

United States Letters Patent No. 2,364,408, except that said United States Letters Patent No. 2,136,875 does not describe the interlocking shoulder and does not describe an end cap for holding a T-shaped spreader on the outside of an end wall of the body of said clamp and against the end wall.

31. That United States Letters Patent No. 2,159,655, issued to De Mooy, May 23, 1939, describes and illustrates a clamp for the same purpose and with identical mechanical construction as United States Letters Patent No. 2,364,408, except

that said United States Letters Patent No. 2,159,655 does not describe the interlocking shoulder and does not describe an end cap for holding a T-shaped spreader on the outside of an end wall of the body of said clamp and against the end wall.

32. That United States Letters Patent No. 2,269,188, issued to De Mooy, January 6, 1942, describes and illustrates a clamp for the same purpose and with identical mechanical construction as United States Letters Patent No. 2,364,408, except that said United States Letters Patent No. 2,269,188 does not describe the interlocking shoulder and does not describe an end cap for holding a T-shaped spreader on the outside of an end wall of the body of said clamp and against the end wall.

33. That United States Letters Patent No. 2,256,634, issued to Webb, September 23, 1941, describes and illustrates a clamp for the same purpose and with identical mechanical construction as United States Letters Patent No. 2,364,408, except that said United States Letters Patent No. 2,256,634 does not describe an end cap for holding a T-shaped spreader on the outside of an end wall of the body of said clamp and against the end wall.

34. That in view of the above-set-forth prior patents, the patent in suit, United States Letters Patent No. 2,364,408 must be limited in its scope to include a body member with an end wall, a cover cap surrounding said wall and holding a T-shaped spreader [30] on the outside of said end wall and inside of said end cover. (O'Connor, Judge.)

CONCLUSIONS OF LAW

1. That Claim 11 of United States Letters Patent No. 2,365,787 is not infringed by any clamp manufactured, used, and sold by Donald H. Finkle.

2. That Claim 11 of United States Letters Patent No. 2,365,787 is not infringed by any clamp manufactured, used, and sold by Wedglock Company, a corporation.

3. That Claims 1 and 2 of United States Letters Patent No. 2,364,408 are not infringed by any clamp manufactured, used, and sold by Donald H. Finkle.

4. That Claims 1 and 2 of United States Letters Patent No. 2,364,408 are not infringed by any clamp manufactured, used, and sold by Wedglock Company, a corporation.

~~5. That Claim 11 of United States Letters Patent No. 2,365,787 must be interpreted to include an end cap for holding a T-shaped spreader on the outside end wall of the body of said clamp and against the end wall. (O'Connor, Judge.)~~

~~6. That Claims 1 and 2 of United States Letters Patent No. 2,364,408 must be interpreted to include an end cap for holding a T-shaped spreader on the outside end wall of the body of said clamp and against the end wall.~~

7. That plaintiffs' complaint should be dismissed for want of equity.

Dated at Los Angeles, California, this 20th day of May, 1947.

/s/ J. F. T. O'CONNOR,
District Judge.

Approved as to form:

LYON & LYON,
/s/ FREDERICK W. LYON,
Attorneys for Defendant.

Disapproved as to form:

MASON & GRAHAM,
/s/ COLLINS MASON,
Attorneys for Plaintiffs.

March 15, 1947, 10:30 a.m.

[Endorsed]: Filed May 20, 1947.

In the United States District Court, Southern District of California, Central Division.
Civil Action No. 5453-O'C

HERMAN H. HELBUSH and
MONOGRAM MANUFACTURING CO.,
a corporation,
Plaintiffs,

vs.

DONALD H. FINKLE, doing business as
WEDGELOCK COMPANY,
Defendant.

FINAL JUDGMENT

This cause came on to be heard at final hearing on the pleadings and proof of all parties, and was

briefed and argued by counsel. Thereupon, upon consideration thereof, it is Ordered, Adjudged and Decreed:

1. That Claim 11 of United States Letters Patent No. 2,365,787 has not been infringed by either defendant, Donald H. Finkle or Wedglock Company, a corporation.

2. That Claims 1 and 2 of United States Letters Patent No. 2,364,408 have not been infringed by either defendant, Donald H. Finkle or Wedglock Company, a corporation.

3. That the complaint herein be and the same is hereby dismissed.

4. That the defendants have judgment against the plaintiffs, Herman H. Helbush and Monogram Manufacturing Co. for its [32] necessary costs and disbursements incurred herein, including the Court Reporter's fee and per diems and the cost for the Court's copy of the transcript of record, all in the sum of \$149.10, to be taxed by the Clerk.

5. That the defendants have judgment against the plaintiffs, Herman H. Helbush and Monogram Manufacturing Co. for reasonable

attorneys' fees herein adjudged to be ~~\$1500.00~~
\$500.00.

Dated at Los Angeles, this 20 day of May, 1947.

/s/ J. F. T. O'CONNOR,
District Judge.

Approved as to form:

LYON & LYON,
/s/ FREDERICK W. LYON,
Attorneys for Defendant.

Disapproved as to form:

MASON & GRAHAM,
/s/ COLLINS MASON,
Attorneys for Plaintiffs.

March 10, 1947, 10:30 a.m.

Judgment entered and Docketed May 20, 1947.
Co. Book 43, Page 261.

[Endorsed]: Filed May 20, 1947.

[Title of District Court and Cause.]

NOTICE OF MOTION

To the defendants above named and To Lyon &
Lyon, Esq., and Frederick W. Lyon:

Please Take Notice that plaintiffs will bring the
annexed motion for new trial on for hearing before
this Court, at its court room in the United States
Courts and Post Office Building, Los Angeles, Cali-

fornea, on Monday, the 9th day of June, 1947, at the hour of 10:00 a.m. or as soon thereafter as the matter may be heard.

Dated this 28th day of May, 1947.

MASON & GRAHAM,
/s/ C. W. MASON,
Attorneys for Plaintiffs.

[Title of District Court and Cause.]

PLAINTIFFS' MOTION FOR NEW TRIAL

Plaintiffs move the Court as follows:

1. For a new trial and rehearing.
2. For an order vacating the findings of fact, conclusions of law and judgment entered herein on May 20, 1947.

3. For an order entering new findings of fact, conclusions of law and judgment holding claim 11 of patent in suit No. 2,365,787 and claims 1 and 2 of patent in suit No. 2,364,408 valid and infringed.

This motion is based upon Rule 59 of Federal Rules of Civil Procedure and upon the following grounds, points and authorities. [35]

(a) Findings of fact 12-15, 24 and 25 (which are the only findings offered to support the judgment except upon jurisdictional grounds) are not supported by and are directly contrary to the evidence and the facts.

(b) The findings do not support the judgment and do not state the grounds upon which the Court adjudged non-infringement.

Reinharts, Inc. v. Caterpillar Tractor Co.,
85 Fed. 628.

(c) The findings of fact, conclusions of law and judgment are contrary to law in that they fail to follow the settled rule of law that only the claims of a patent define what the patent grant covers and what is asserted to be infringed.

Reinharts, Inc. v. Caterpillar Tractor Co.,
supra;

Smith v. Snow, 294 U. S. 1, 79 L. Ed. 721;
Motion Picture Patents v. Universal Film
Mfg. Co., 243 U. S. 510, 61 L. Ed. 871.

(d) The findings of fact, conclusions of law and judgment are contrary to law in that they fail to follow the settled rule of law that one does not avoid infringement by using a structure which is the full equivalent of the patented structure or by merely calling a part by a different name.

Smith v. Snow, *supra*;

Banker's Utilities Co. v. Pacific National
Bank, 32 Fed. (2d) 879 (CCA 9);

Jay v. Suetter, 32 F. (2d) 879 (CCA 9).

(e) The judgment is contrary to the law as stated by the Ninth Circuit Court of Appeals in Reinharts, Inc. v. Caterpillar Tractor Co., *supra*, and by the Supreme Court in Smith v. Snow, *supra*.

(f) The judgment awarding attorneys' fees is improper in a case prosecuted in good faith against a persistent and wilful infringer.

Brief Argument

“The question of infringement is a question of fact.”

Reinharts, Inc. v. Caterpillar Tractor Co.,
supra.

Consequently, findings of fact should recite facts supporting the judgment of non-infringement and should recite facts which would enable an appellate tribunal to determine upon what grounds the judgment is based.

Findings 12-15, 24 and 25 are the only findings offered to support the judgment of the non-infringement. The remaining findings relate only to jurisdictional matters. Of the specified findings it is submitted that those numbered 12-15, inclusive, are nothing more than conclusions of law, reading as follows:

“12. That Donald H. Finkle, defendant, has not infringed United States Letters Patent No. 2,364,408.

“13. That Donald H. Finkle, defendant, has not infringed United States Letters Patent No. 2,365,787.

“14. That Wedgelock Company, a corporation, has not infringed United States Letters Patent No. 2,364,408.

“15. That Wedglock Company, a corporation, has not infringed United States Letters Patent No. 2,365,787.” [37]

It is obvious, therefore, that those findings do not recite facts supporting the judgment of non-infringement and certainly an appellate court could not determine from those findings upon what grounds the judgment was based.

Finding 25 reads as follows:

“25. That the clamps manufactured, used, and sold by defendants have a two-piece body with the T-shaped spreader positioned inside of the body.”

It is submitted that this finding is entirely immaterial, being a mere play upon words. The defendant's devices, as well as the patented devices, include a cylindrical body with a cap attached to its outer end by means of the skirt of the cap being crimped onto the body periphery. Whether one calls that construction a “two-piece body” or “a body with an attached cap” is immaterial. In substance the terms are the same and in determining questions of infringement the courts are interested only in the substance. The purpose of the cap in the defendant's structure as well as in the patented structure is to permit the mounting of the spreader from the outer end of the body, to hold the spreader against outward escape from the body, and to provide a smooth work-engaging surface. The law would be entirely meaningless if one could avoid infringement simply by calling a part by a different name.

The only remaining one of those findings is that numbered 24, reading as follows:

“24. That the clamps manufactured, used and sold by the defendants, Donald H. Finkle and the Wedglock Company, a corporation, do not include an end cap for holding a T-shaped spreader on [38] the outside end wall of the body of said clamp and against the end wall.”

Even this finding lends no support to the judgment unless it is construed to imply that the patent claims in issue are all necessarily limited to a clamp structure wherein an attached end cap holds a T-shaped spreader on the outside and against the body end wall.

As will be pointed out hereinafter, claims 1 and 2 of patent in suit No. 2,364,408 certainly cannot validly be so construed because that patent does not even disclose an end wall on the body. It has an open-ended body with a washer or ring interposed between the spring and spreader precisely as is used by defendant. And no valid reason exists to so constructed claim 11 of patent in suit No. 2,365,787 because the claim does not include an end wall as an element and an end wall is neither necessary for operability or novelty.

Re Patent in Suit No. 2,364,408.

For purposes of this argument it will suffice to quote only claim 2 of this patent, as follows:

“2. A sheet metal clamp comprising, in combination,

a cylindric body,

an end cap mounted on the body in position closing the outer end thereof said cap presenting an opening therethrough and a work-engaging outer surface

a plunger reciprocally mounted in the body, said plunger having a work-engaging member protractable and retractable through said opening,

a spreader member having a laterally projecting inner end portion disposed in the cap and an outer end portion projecting outwardly through said opening in engagement with the work-engaging member,

an inwardly disposed flange on the inner surface of the body adjacent its inner end,

a coil spring in the body around and retractively engaging the plunger and tool-operated means for protracting the plunger against the pressure of said spring comprising a plunger engaging member reciprocally mounted in and projecting from the inner end of the body for manual engagement, said member having a relatively increased diameter inner end portion engageable against said flange when the plunger is in fully retracted position.”

There is no mention of a body end wall in the claim. On the contrary, in describing the end cap

the claim states that the cap is “mounted on the body in position closing the outer end thereof.” This necessarily means that the end of the body is open except for the end cap and if the body has an end wall it could not be open.

Even in the specific embodiment of the invention illustrated in the patent drawings, the body is open at both ends until closed at its outer end by the end cap. The patent drawing shows a washer or ring interposed between the spring and spreader precisely as is used by the defendant’s clamp. [40]

Thus, even if the ring or washer shown in the drawings of patent in suit No. 2,364,408 could be called an end wall, defendant’s clamps also have an end wall and infringe.

In patent law it is fundamental that only the patent claims define what the invention is that is covered by the patent grant and what is asserted to be infringed. The claims are like the metes and bounds clause of a deed. While a patentee illustrates one specific embodiment of his invention in the patent drawings, he does not have to include all the illustrated elements in all the claims or to limit all the claims to the specific embodiment.

“A patentee may, however, describe all the devices in his machine or manufacture, and instead of claiming all or any particular portion of them in combination, may claim so much of the described mechanism as produces a particular described result.”

“Walker on Patents”, Deller’s Edition, page 1697.

“Structures which are designed morely for the purpose of evading the spirit of the invention, but which contain all the elements of the claims, are infringements of the patent.”

“Walker on Patents”, *supra*, page 1690.

“These (the claims) so mark where the progress claimed by the patent begins and where it ends that they have been aptly likened to the description in a deed, which sets the bounds to the grant which it contains. It is to the claims of every patent, therefore, that we must turn when we are seeking to determine what the invention is, the exclusive use of which is given to the inventor by the grant provided for by the statute.”

Motion Picture Patents v. Universal Film
Mfg. Co., *supra*.

In Exhibit A attached hereto claim 2 of patent in suit No. 2,364,408 is quoted and read, by appropriate reference characters, upon defendant's clamp, Exs. 11 and 17, as well as upon the specific clamp structure illustrated in the patent drawings.

Plaintiffs' expert has read those claims upon defendant's said clamps in the most minute detail, (R. 81). This evidence is not refuted because defendant's expert admitted that, in his analysis of the patent, he had not considered the claims at all. (R. 232).

Thus, there is no basis whatsoever for construing the claims of patent in suit No. 2,364,408 to include a body end wall. Not only do the claims fail to

recite an end wall but, if they did, it would be contrary to the disclosure of the patent.

Moreover, even if the disclosure of the patent would support such an interpretation, it would be contrary to law to read an end wall element into the claims when the claims do not call for one and when an end wall is not necessary to operability or novelty.

In the Ninth Circuit Court of Appeals case of *Reinharts, Inv. v. Caterpillar Tractor Co.*, *supra*, the patent involved a tractor. The specification of the patent described it as a "frameless" tractor, although the particular claim of the patent in the issue made no mention of the structure being frameless. In holding that the claim could not be interpreted to include an element which it did not recite, even though the element was described in the specifications, the Court said: [42]

"Appellant contends that the tractor described in the Wickersham specification is a 'frameless' tractor, and that the accused tractor is not of that type and, therefore, cannot be said to infringe the Wickersham patent. This contention must fail. Wickersham's invention is defined, not by the specification, but by the claims of his patent. *Smith v. Snow*, 294 U. S. 1, 11, 55 S. Ct. 279, 79 L. Ed. 721; *Altoona Public Theatres v. American Tri-Ergon Corporation*, 294 U. S. 477, 487, 55 S. Ct. 455, 79 L. Ed. 1005; *Continental Paper Bag Co. v. Eastern Paper Bag Co.*, *supra*, 210 U. S. 405, at page 419, 28 S. Ct. 748, 52 L. Ed. 1122. There is in

the claims no mention of a 'frameless' tractor. That expression is merely appellant's characterization of a tractor having, instead of the usual frame, a central body member comprising a combined engine and transmission case, as described above. Furthermore, it appears from the evidence that appellant's tractor has, instead of the usual frame, a central body member substantially identical with that described in the Wickersham specification. Hence, if Wickersham's is a 'frameless' tractor, so also is the tractor sold by appellant."

In the Supreme Court case of *Smith v. Snow*, *supra*, the patent involved a method for incubating eggs. The patent specification stated that, in the preferred method of carrying out [43] the invention, the eggs should be arranged in a particular manner in the machine, although the patent claims did not include any such requirement. The defendant urged that the claims must be interpreted to be limited to the particular manner of arranging the eggs described in the specification although the claims did not recite this element. In denying this construction of the claim, the Supreme Court said:

"We may take it that, as the statute requires, the specifications just detailed show a way of using the inventor's method, and that he conceived that particular way described was the best one. But he is not confined to that particular mode of use since the claims of the patent,

not its specifications, measure the invention. Paper Bag Patent case (Continental Paper Bag Co. v. Eastern Paper Bag Co.) 210 U. S. 405, 419, 52 L. Ed. 1122, 1128, 28 S. Ct. 748; McCarty v. Lehigh Valley R. Co., 160 U. S. 110, 116, 40 L. Ed. 358, 361, 16 S. St. 240; Winans v. Denmead, 5 How. 330, 343, 14 L. Ed. 717, 722. While the claims of a patent may incorporate the specifications or drawings by reference, see Snow v. Lake Shore & M. S. R. Co., 121 U. S. 617, 630, 30 L. Ed. 1004, 1008, 7 S. Ct. 1343, and thus limit the patent to the form described in the specifications, it is not necessary to embrace in the claims or describe in the specifications all possible forms in which the claimed principle may be reduced to practice.” [44]

Patents should be construed liberally and, under the rule *ut res magis valeat quam pereat*, they should be interpreted so as to uphold and not destroy the right of the inventor. It is improper for a court, in order to allow an infringer to escape the consequences of his act, to construe a patent claim as including an element which it does not mention and which is not necessary to operability.

In line with the well-settled doctrine of equivalence, the Court should have held defendant's clamps Exs. 11, 11a and 17 to infringe claims 1 and 2 of patent in suit No. 2,364,408 even if the Court elected to call the ring or washer interposed between the spring and spreader an “end wall”, because the de-

fendant's devices are precisely like the patented devices in this and in all other material respects.

Banker's Utilities Co. v. Pacific National Bank, *supra*;

Jay v. Suetter, *supra*;

Re Patent in Suit No. 2,365,787.

For the same reasons and according to the well-settled law hereinbefore discussed, claim 11 of patent in suit No. 2,365,787 cannot lawfully be construed to necessarily include a body end wall. This claim reads as follows:

“11. A clamp for holding perforated sheets together in superposed relation, comprising a cylindrical body,

a laterally flexible retaining member reciprocally mounted in the body for protraction and retraction through the outer end of the body, a spreader bar having lateral sliding engagement with the retaining member, said spreader having an angularly disposed inner end portion, and

means for holding the spreader bar against outward longitudinal movement relative to the body, the last-named means consisting of a cover cap having a cylindrical skirt secured to the outer end portion of the body periphery and an end wall whose inner surface provides an abutment for the angular portion of the spreader bar and whose outer surface provides a sheet-engaging portion.”

In Exhibit B annexed hereto this claim is read

upon defendant's clamps Exhibits 11, 11a, 17, 12, 12a, 18 and upon the clamp illustrated in the patent drawings. Plaintiffs' expert also read the claim upon defendant's structure in every detail (R. 72.) and this was not refuted by defendant's expert.

The specific embodiment of the invention shown in the drawings of this patent does have an end wall formed integral with the body of the clamp. However, as plaintiffs' expert pointed out (R. 72) this is merely an abutment to prevent the end of the spring from bearing directly against the spreader, which is also the purpose of the washer used in defendant's clamps. The important consideration is that the claim does not call for a body end wall and it is improper to read into the claim an element which it does not call for and which is not necessary to operability or novelty. [46]

Allowance of Attorneys' Fees Is Improper

When this action was filed, the patent statute contained no provision for allowance of attorneys' fees to a successful litigant.

In August 1946 the patent statute (35 USCA 70) was amended to read as follows:

"The Court may in its discretion award reasonable attorneys' fees to the prevailing party upon the entry of judgment on any patent case."

While we find no decisions interpreting this recent, new provision, inasmuch as such allowance was expressly made discretionary instead of manda-

tory, it is submitted that the practice followed by the courts in applying their discretionary power granted by the patent statute relating to trebling of damages in cases of wilful infringement (35 USCA 67), is pertinent to this new provision.

It has been only in the most flagrant and wilful infringement cases that the courts have exercised this discretionary power to treble damages. The rule is summed up in 35 USCA 365, with citation of cases, as follows:

“If the infringement is deliberate and intentional or wanton and persistent, damages will be increased by the Court, but generally not unless such is the case.”

Typical of the language of the decisions on this point is that in *T. L. Smith Co. v. Cement Tile Machinery Co.*, 258 F. 636, 638, Cert. denied 250 U. S. 659, as follows: [47]

“There is no evidence or claim that the infringing structures were wantonly or wilfully made by the defendant to injure the plaintiffs, or for any other reason than a mistaken one of a supposed right to make them, and in such cases compensation to the patentee for the damages sustained by him, and not punishment of the defendant, should limit the plaintiff's recovery to the actual damages they have sustained.”

In discussing a plaintiff's claim for allowance of attorneys' fees in a patent case before this discre-

tionary power was granted by statute, the Supreme Court said, in *Day v. Woodworth et al.*, 13 How. 363; 14 L. Ed. 181, that if such a practice were followed

“... the defendant may be truly said to be in misericordia, being at the mercy of both the court and jury.”

The courts have treated this discretionary power as one to be exercised only where the facts warrant punitive damages.

Certainly there is no fact or circumstance either alleged or present in this case to warrant the assessment of any punitive penalty upon plaintiffs. They have merely asserted a right granted them by the Constitution and patent law. Defendant has failed to show either that the patent grants were not valid ones or that the patent claims cannot be fairly and reasonably read upon defendant's devices. On the contrary, plaintiffs' expert has specifically read the claims upon defendant's structures.

It is submitted that a patentee should be entitled to assert his patent grant in good faith without having a punitive penalty [48] imposed upon him. It would jeopardize our industrial advancement if an inventor dared not ask the courts to interpret his patent without risking a punitive penalty which might bankrupt him if the court should interpret the patent to mean something which it does not recite. Such a rule would seriously discourage inventors—and would produce a result just opposite to

that intended by the Constitutional foundation for the patent law.

Wherefore, plaintiff's submit that a new trial and rehearing should be granted and that new findings, conclusions and judgment should be entered holding the patents valid and infringed.

Dated this 28th day of May, 1947.

Respectfully submitted,

MASON & GRAHAM,
/s/ C. W. MASON,
Attorneys for Plaintiffs.

Claim 2

A sheet metal clamp, comprising, in combination,

a cylindric body (5),

an end cap (11) mounted on the body in position closing the outer end thereof, said cap presenting an opening (12) therethrough and a work-engaging outer surface,

a plunger (20) reciprocally mounted in the body, said plunger having a work-engaging member protractable and retractable through said opening,

a spreader member having a laterally projecting inner end portion (25) disposed in the cap and an outer end portion (25a) projecting outwardly through said opening in engagement with the work-engaging member,

an inwardly disposed flange (16) on the inner surface of the body adjacent its inner end,

a coil spring (32) in the body around and retractively engaging the plunger and tool-operated means for protracting the plunger against the pressure of said spring comprising a plunger engaging member (17) reciprocally mounted in and projecting from the inner end of the body for manual engagement, said member having a relatively increased diameter inner end portion (33) engageable against said flange when the plunger is in fully retracted position.

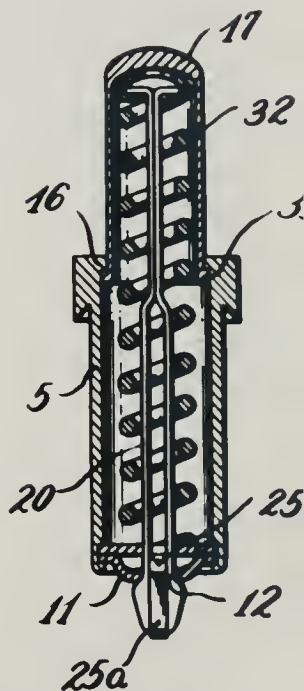
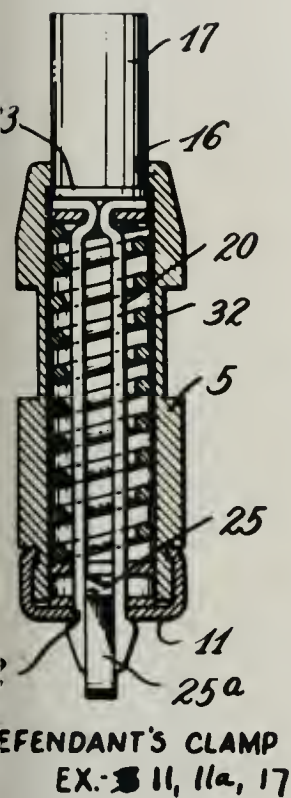


FIG. 1
PATENT 2364408

At a stated term, to wit: The February Term. A. D. 1947, of the District Court of the United States of America, within and for the Central Division of the Southern District of California, held at the Court Room thereof, in the City of Los Angeles, on Wednesday, the 25th day of June in the year of our Lord one thousand nine hundred and forty-seven.

Present: The Honorable: J. F. T. O'Connor,
District Judge.

[Title of Cause.]

Minute Order June 25, 1947

DENYING MOTION FOR NEW TRIAL

The Court enters ruling on motion for new trial filed by plaintiffs May 29, 1947, as follows:

“Oral arguments having been heard by the Court, and the Court having examined the motion and the authorities, it is ordered that the motion for new trial is denied and exception is allowed plaintiffs.”

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice Is Hereby Given that Herman H. Helbush and Monogram Manufacturing Co., a corporation, plaintiffs in the above-entitled action, do hereby appeal to the Circuit Court of Appeals for the Ninth Circuit from the final decree and judgment entered herein on May 20, 1947, in which action an

order was entered on June 25, 1947, denying motion for new trial herein filed by said plaintiffs on May 29, 1947.

Dated this 23rd day of September, 1947.

MASON & GRAHAM,
/s/ C. W. MASON,
Attorneys for Plaintiffs.

[Endorsed]: Filed and mailed copy to Lyon & Lyon, Sept. 23, 1947. [53]

[Title of District Court and Cause.]

BOND ON APPEAL

No. 960981

Whereas, the above named Plaintiffs have commenced an action in the District Court of the United States, Southern District of California, Central Division asking said Court to uphold the validity of certain United States Letters Patent and to find said Letters Patent infringed by the Defendants here, and to grant a perpetual injunction in favor of said Plaintiffs and

Whereas, on June 25, 1947, judgment was entered in said Court in favor of the defendants herein and

Whereas, Herman H. Helbush and Monogram Manufacturing Co., a corporation, Plaintiffs herein, are dissatisfied with said judgment and are desirous of Appealing therefrom to the United States Circuit Court of Appeals for the Ninth Circuit,

Now, Therefore, in consideration of the premises and of such appeal the undersigned Indemnity In-

insurance Company of North America, a Pennsylvania [54] corporation, does acknowledge itself bound as Surety for said appellants, Herman H. Helbush and Monogram Manufacturing Co., a corporation, in the sum of Two Hundred Fifty and No/100 Dollars (\$250.00) conditioned that said appellants, Herman H. Helbush and Monogram Manufacturing Co., a corporation, will pay all costs awarded against them on the appeal, and it does hereby agree that in event of the default or contumacy of the said appellants execution may issue against the undersigned Surety, its goods, land and chattels, for the amount of said costs not exceeding the sum of Two Hundred Fifty and No/100 Dollars (\$250.00.).

Sealed and dated this 22nd day of September, 1947.

INDEMNITY INSURANCE
COMPANY OF NORTH
AMERICA,

By /s/ HENRY R. BUCK,

Attorney in Fact.

Examined and recommend for approval as provided in Rule 8.

/s/ C. W. MASON,

Attorney.

I hereby approve the foregoing bond this 23 day of Sept., 1947.

J. F. T. O'CONNOR,
Judge.

State of California,
County of Los Angeles—ss.

On this 22nd day of September in the year one thousand nine hundred and forty-seven before me Dorothy Carolyn Hornby, a Notary Public in and for the County of Los Angeles, personally appeared Henry R. Buck, known to me to be the person whose name is subscribed to the within instrument as the Attorney-in-fact of the Indemnity Insurance Company of North America, and acknowledged to me that he subscribed the name of the Indemnity Insurance Company of North America thereto as principal, and his own name, as Attorney-in-fact.

[Seal] /s/ DOROTHY CAROLYN HORNBY,
Notary Public in and for the county of Los Angeles, State of California.

My Commission Expires Sept. 7, 1951.

[Endorsed]: Filed Sept. 23, 1947.

[Title of District Court and Cause.]

PLAINTIFFS-APPELLANTS' DESIGNATION
OF PORTIONS OF RECORD ON APPEAL
PURSUANT TO RULE 75

The Clerk of this Court, in conformance with Rule 75 of Federal Rules of Civil Procedure, is requested to transmit to the Clerk of the Circuit Court of Appeals for the Ninth Circuit the following designated portions of the record, proceedings and evi-

dence in this case, certifying those portions thereof necessary to be certified pursuant to said rules or pursuant to the rules of the said Circuit Court of Appeals:

A. The original reporter's transcript of the evidence and proceedings taken at the trial of this case.

B. The following pleadings and documents on file herein:

1. Complaint.
2. Defendants' amended answer to complaint, and counterclaim.
3. Plaintiffs' answer to amended counterclaim.
4. Stipulation dated January 15, 1947, dismissing complaint as to Patent 2,320,493 and dismissing defendants' counterclaim for infringement of Patent 2,393,088.
5. Supplemental complaint.
6. Stipulation dated January 24, 1947, re supplemental complaint and answer thereto.
7. Minute order entered February 18, 1947, holding non-infringement.
8. Defendants' proposed findings of fact and conclusions of law.
9. Findings of fact and conclusions of law as entered.
10. Final judgment.
11. Plaintiffs' motion for new trial filed May 29, 1947.

12. Minute order entered June 25, 1947, denying plaintiffs' motion for new trial.
13. Notice of appeal.
14. Bond on appeal.
15. This designation.

C. The following original plaintiffs' exhibits:

- Ex. 1. Patent in suit 2,365,787.
- Ex. 2. Patent in suit 2,364,408.
- Ex. 3. File history of Patent 2,365,787.
- Ex. 3a. Reference Patent 2,248,882.
- Ex. 3b. Reference Patent 2,256,243.
- Ex. 3c. Reference Patent 2,136,875.
- Ex. 4. File history of Patent 2,364,408.
- Ex. 5. Clamp device.
- Ex. 6. Clamp device.
- Ex. 7. Clamp device.
- Ex. 8. Plaintiffs' catalog.
- Ex. 9. Stipulation dated Jan. 15, 1947.
- Ex. 10. Clamp device.
- Ex. 11. Clamp device.
- Ex. 11a. Clamp device.
- Ex. 12. Clamp device.
- Ex. 12a. Clamp device.
- Ex. 13. Clamp device.
- Ex. 14. Test Plate.
- Ex. 15. Clamp-operating tool.
- Ex. 16. Chart.
- Ex. 17. Chart.
- Ex. 18. Chart.
- Ex. 19. Chart.

- Ex. 20. Chart.
- Ex. 21. Chart.
- Ex. 22. Chart.
- Ex. 23. Reference Patent 2,292,489.
- Ex. 24. Concise statement of points under Rule 75(d).

D. The following original defendants' exhibits:

- Ex. A. Clamp device.
- Ex. B. Clamp device.
- Ex. C. Clamp device.
- Ex. D. Parts of clamp device.
- Ex. E. Clamp device sub-assembly.
- Ex. F. Clamp device sub-assembly.
- Ex. G. Clamp device sub-assembly.
- Ex. H3. British Patent 413,403.
- Ex. H4. British Patent 443,683.
- Ex. H5. United States Patent 2,136,875.
- Ex. H6. United States Patent 2,159,655.
- Ex. H7. United States Patent 2,269,188.
- Ex. H8. United States Patent 2,256,634.
- Ex. H9. United States Patent 2,276,344.
- Ex. H10. United States Patent 2,271,879.
- Ex. H11. United States Patent 2,266,929.
- Ex. I. Chart.
- Ex. J. Chart.
- Ex. K. Chart.
- Ex. L. Chart.

Ex. M. Sketch.

Ex. N. Chart.

Ex. O. Chart.

Dated this 25th day of September, 1947.

MASON & GRAHAM,
/s/ C. W. MASON,
Attorneys for Plaintiffs.

Received copy of the within Designation of Portions, this 26th day of September, 1947.

LYON & LYON,
/s/ FREDERICK W. LYON,
Attorneys for Defendant.

[Endorsed]: Filed Sept. 26, 1947.

[Title of District Court and Cause.]

STIPULATION FOR USE OF ONE COPY
OF REPORTER'S TRANSCRIPT

It Is Hereby Stipulated by and between the parties to this action, through their respective attorneys, that one one copy of the reporter's transcript of the evidence and proceedings at the trial of this action shall be filed by appellants herein, which copy shall be available for use by the Circuit Court of Appeals for the 9th Circuit.

This stipulation shall be included as an addition

to plaintiffs appellants' designations of portions of record on appeal pursuant to Rule 75.

Dated this 25th day of September, 1947.

MASON & GRAHAM,
/s/ C. W. MASON,
Attorneys for Plaintiffs.
LYON & LYON,
/s/ FREDERICK W. LYON,
Attorneys for Defendant.

It is So Ordered:

/s/ J. F. T. O'CONNOR,
U. S. District Judge.

[Endorsed]: Filed Oct. 9, 1947.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK

I, Edmund L. Smith, Clerk of the District Court of the United States for the Southern District of California, do hereby certify that the foregoing pages numbered from 1 to 66, inclusive, contain full, true and correct copies of Complaint for Infringement of Letters Patents; Amended Answer to Complaint and Counterclaim; Answer to Amended Counterclaim; Dismissal; Stipulation; Supplemental Complaint for Infringement of Letters Patent; Minute Order Entered February 18, 1947; Findings of Fact and Conclusions of Law; Final Judgment; Notice of Motion; Plaintiffs' Motion for New Trial;

Minute Order Entered June 25, 1947; Notice of Appeal; Bond on Appeal; Statement of Points on Appeal; Designation of Record on Appeal; Stipulation and Order re Reporter's Transcript and Stipulation and Order re Original Exhibits, which, together with copy of reporter's transcript of proceedings on January 22, 23 and 24, 1947 and Original Plaintiffs' Exhibits 1, 2, 3, 3a, 3b, 3c, 4-11, 11a, 12, 12a, 13-23 and Original Defendant's Exhibits A-G, H4-H-11, I-O, transmitted herewith, constitute the record on appeal to the United States Circuit Court of Appeals for the Ninth Circuit.

I further certify that my fees for preparing, comparing, correcting and certifying the foregoing record amount to \$8.70 which sum has been paid to me by appellants.

Witness my hand and the seal of said District Court this 16th day of October, A. D. 1947.

[Seal]

EDMUND L. SMITH,
Clerk.

By /s/ THEODORE HOCKE,
Chief Deputy Clerk.

In the District Court of the United States for the
Southern District of California, Central Division

Civil Action No. 5453-O'C.

HERMAN H. HELBUSH and
MONOGRAM MANUFACTURING CO.,
a corporation,
Plaintiffs,
vs.

DONALD H. HINKLE, doing business as
WEDGELOCK COMPANY,
Defendant.

REPORTERS' TRANSCRIPT
OF PROCEEDINGS

Honorable J. F. T. O'Connor,
Judge Presiding

Counsel:

For the Plaintiffs: Mason & Graham, By Collins
Mason, Esq., 811 West Seventh Street, Los Angeles,
California.

For the Defendant: Lyon & Lyon, By Frederick
W. Lyon, 811 West Seventh Street, Los Angeles,
California. [1*]

Los Angeles, California, Wednesday, January 22,
1946, 2:00 P.M.

The Court: Mr. Cross, will you call the calendar?

The Clerk: Yes, your Honor. No. 5453, Herman

* Page numbering appearing at top of page of Reporter's certified Transcript of Record.

H. Helbush and others, vs. Donald H. Finkle, for court trial.

Mr. Mason: Ready for the plaintiff.

Mr. F. W. Lyon: Ready.

The Court: Proceed.

Mr. F. W. Lyon: Before we proceed, might I suggest that we have a stipulation on the record that daily transcript be furnished and that the court's copy be paid 50 per cent by each party and any copies the parties desire to be paid by themselves; the original transcript to be taxed as costs at the end of the trial.

Mr. Mason: So stipulated.

The Court: The stipulation will be approved.

Mr. Mason: May it please the court: There were originally three patents charged to be infringed by the plaintiff, and there is one patent set up as a counter-claim. Now, we have stipulated for a dismissal as to Patent 2,320,493, originally named in the complaint, and as to the patent charged in the counter-claim 2,393,088. I have the stipulation here, your Honor.

Also, I have here a trial brief with charts attached to it and copies of the patents annexed, which your Honor may [2] wish to follow.

Now, before making an opening statement, I would like to introduce some exhibits and also have some marked for identification, because I would like to refer to some of them in the course of my opening statement, and I think we will keep the record straight in that way.

The Court: That will be satisfactory.

Mr. Mason: First, I will offer the patents in suit.
As Exhibit No. 1 Patent No. 2,365,787.

The Clerk: Plaintiffs' Exhibit No. 1.

The Court: 2,365,787?

Mr. Mason: '787. I will refer to that throughout the trial as Patent '787, for brevity.

Mr. F. W. Lyon: May I make a suggestion? We might as well have them put in evidence, unless I have some objection to them.

Mr. Mason: I am offering them in evidence.

Mr. F. W. Lyon: All of these exhibits, because it will save time.

The Court: Now, I am not sure of the number.

The Clerk: The first was No. 1, your Honor.

Mr. Mason: As exhibit next in order I offer No. 2,364,408.

The Clerk: That is Plaintiffs' Exhibit No. 2.

The Court: 2,364,408? [3]

Mr. Mason: 2,364,408. Here are a couple of extra copies of each patent, your Honor, for your use.

The Court: That is Exhibit No. 2, Mr. Cross?

The Clerk: Yes, your Honor.

Mr. Mason: Now, I will offer in evidence the file history of Patent No. 2,365,787.

Mr. F. W. Lyon: The file wrapper, you mean?

Mr. Mason: The file wrapper.

The Court: As Exhibit No. 3?

The Clerk: Plaintiffs' Exhibit No. 3.

The Court: That is the file wrapper. What is the number?

The Clerk: The number, your Honor, is 2,365,-787.

Mr. Mason: Now, practically all the reference cited against the application during its prosecution before the Patent Office have been set up in the defendant's answer as to prior art, and I assume that the defendant will offer those in evidence in the course of the case. So as to avoid duplication I will only offer three patents which were cited and not named in the answer as being the prior art cited against the Patent '787. The first will be the Lear patent, 2,248,882.

The Court: I cannot possibly get those down as fast as you read them, counsel.

Mr. Mason: 2,248,882. That was a patent cited as a reference against Patent '787. I would like to have that [4] marked Exhibit 3-A.

The Clerk: Plaintiffs' Exhibit 3-A.

Mr. Mason: The next one of those patents will be the Edwards patent, 2,256,243, as Exhibit 3-B.

The Clerk: Plaintiffs' Exhibit 3-B.

The Court: That is called what? What patent?

Mr. Mason: Edwards.

The Court: E-d-w-a-r-d-s?

Mr. Mason: Yes, your Honor. The third one of those is 2,136,875.

The Court: 2,136,875.

Mr. Mason: Issued to Blanc, B-l-a-n-c, as Exhibit 3-C.

The Clerk: Plaintiffs' Exhibit 3-C. [5]

I now offer the file wrapper of patent 2,364,408.

The Court: 2,364,408.

Mr. Mason: The references cited against that are set up in the answer.

The Clerk: That will be Plaintiffs' Exhibit 4.

Mr. Mason: Next, I would like to offer for identification one of the Plaintiffs' clamp devices as Exhibit 5.

The Clerk: Plaintiffs' Exhibit No. 5 for identification.

Mr. F. W. Lyon: Plaintiffs'?

Mr. Mason: Plaintiffs', yes.

The Court: Is there some question about it? I notice counsel offers it for identification.

Mr. Mason: Unless counsel approves it.

Mr. F. W. Lyon: I think I can just take a look at it. I am sure that I can, your Honor.

The Court: That is fine. It saves time.

Mr. F. W. Lyon: I just want to see which one is which. Yes; there is no objection to these.

Mr. Mason: I will offer them in evidence, your Honor.

The Court: All right.

The Clerk: 5 in evidence.

Mr. Mason: And, as Exhibit 6, I will offer another one of plaintiffs' clamps.

The Clerk: Plaintiffs' Exhibit No. 6 in evidence.

Mr. Mason: And, as Exhibit 7, another one of plaintiffs' clamps. [6]

The Clerk: Plaintiffs' Exhibit No. 7 in evidence.

Mr. Mason: And, as Plaintiffs' Exhibit 8, one of plaintiffs' catalogs.

Mr. F. W. Lyon: The only objection to this that I have is as to its materiality. It states right on it it was printed long after these patents were issued, your Honor, in 1944.

Mr. Mason: Suppose we have it marked for identification. It is merely to assist the court in examining the subject matter.

The Clerk: No. 8 for identification.

Mr. Mason: Now I would like to offer a stipulation of facts entered into by the parties as to title, and as to certain dates of invention, and as to notice, and as to manufacture of the clamps by the defendant which we charge to infringe.

The first one of these is Exhibit 9, which, however, is not charged to be an infringement.

The Court: No; 10. The stipulation is 9.

The Clerk: Do you wish that as No. 9, your Honor?

The Court: Yes. Here it is, Mr. Cross.

The Clerk: Yes, your Honor. The stipulation is Plaintiffs' Exhibit No. 9, and this clamp will be Plaintiffs' Exhibit 10 in evidence. [7]

The Court: Who manufactured the clamp?

Mr. Mason: That is the defendant's clamp, your Honor. That, however, is not charged to be an infringement.

As the next exhibit, 11, will be one of the defendant's clamps which is referred to in the stipulation as "stipulation exhibit B".

The Clerk: That will be Plaintiffs' Exhibit No. 11 in evidence.

Mr. Mason: And, as 11-A, I would like to offer a specimen of the same clamp, defendant's, but cut open so that the inside may be inspected.

The Clerk: 11-A in evidence.

Mr. Mason: And, as the next exhibit, one of the defendant's clamps, which is "stipulation exhibit C".

The Clerk: That will be Plaintiffs' Exhibit No. 12 in evidence.

The Court: Now, wait. Counsel stated "C". It has either got to be "11-C" or——

Mr. Mason: No. That was stipulation exhibit C, your Honor, referred to in the stipulation of facts.

The Court: Now, wait. It is 12, then, Mr. Cross?

The Clerk: Yes, your Honor.

The Court: What is this instrument?

Mr. Mason: That is one of the defendant's clamps which is charged as an infringement. 11, also, is charged to infringe. [8]

And, as 12-A, I will offer the same clamp as Exhibit 12, except that it is cut in half so that the inside may be inspected, and a lighter spring has been substituted in lieu of a heavier spring so it will not tend to fly out.

Mr. F. W. Lyon: We will stipulate that that is our clamp of defendant's manufacture, but that a light spring, and not the spring that would be used, has been placed in there.

The Clerk: That will be Plaintiffs' Exhibit 12-A.

Mr. Mason: And I will state that Exhibits 11 and 12 and, of course, 11-A and 12-A, which are the same, are the only ones charged to constitute infringement of the patents in suit; and both of those exhibits, 11 and 12, we charge to infringe patent '787, but Exhibit 12 we charge only to infringe patent '408.

Now I would like to offer for identification—I will offer it in evidence—a specimen of a type of clamp known as “Cleco” clamp to which reference will be made during the case.

The Court: How do you spell it?

Mr. Mason: C-l-e-c-o.

The Clerk: Plaintiffs’ Exhibit 13 in evidence.

Mr. Mason: As the next exhibit, I will offer a test plate for use in demonstrating these clamp devices. [9]

The Clerk: Plaintiffs’ Exhibit 14 in evidence.

The Court: Will you repeat what counsel just said there?

(Record read by the reporter.)

Mr. Mason: And, as the next exhibit, I would like to offer a clamp-operating tool or gun which is used to operate these clamp devices.

The Clerk: Plaintiffs’ Exhibit 15 in evidence.

Mr. Mason: I would like to offer in evidence plaintiffs’ interrogatories 1 to 4, inclusive; 7 to 7-J, inclusive; 7-AA to 7-JJ, inclusive; 7-BBB to 7-JJJ, inclusive; 8 to 13, inclusive; 17 to 22, inclusive; 26 to 31, inclusive; and 35 to 40, inclusive; as well as the defendant’s answers to those interrogatories.

* * * * *

The Court: All right.

Mr. Mason: I will call Mr. Livingston.

E. R. LIVINGSTON

called as a witness by and on behalf of the plaintiffs, having been first duly sworn, was examined and testified as follows:

The Clerk: Your full name, please?

The Witness: E. R. Livingston.

The Court: Spell it.

The Witness: L-i-v-i-n-g-s-t-o-n.

Direct Examination

By Mr. Mason:

Q. What is your business Mr. Livingston?

A. I am an officer of the Monogram Manufacturing Company.

Q. What officer?

A. Vice-president.

Q. Is that one of the plaintiffs in this case?

A. Yes.

Q. Now, what is the business of the Monogram Manufacturing Company?

A. Well, the Monogram Manufacturing Company is engaged in the manufacture of sheet metal fasteners; also, plastic items for five-and-ten-cent store distribution and other tools and equipment for both aircraft and automobile industry. [18]

Q. Now, how long has it been so engaged?

A. Since 1938.

Q. You have mentioned that a part of this business is the manufacture of the sheet metal clamps.

(Testimony of E. R. Livingston.)

I show you Plaintiffs' Exhibits 5, 6, and 7, and ask you if those are specimens of the plaintiffs' product.

A. Yes, all three of these clamps are manufactured by the Monogram Manufacturing Company.

Q. Are they manufactured under these patents in suit?

Mr. F. W. Lyon: I object to that, your Honor, as a conclusion of the witness: Are those made under the patent in suit?

The Court: Yes. The testimony will show whether they are or not.

Mr. Mason: I withdraw the question.

Q. (By Mr. Mason): Now, when did the Monogram Manufacturing Company commence the manufacture of the clamps evidenced by Exhibit 5?

A. In March, of 1941.

Q. Were the other exhibits manufactured subsequent to that time?

A. At later dates, yes.

The Court: That is Exhibits 6 and 7?

The Witness: 6 and 7, yes. [19]

Q. (By Mr. Mason): So that the court may have a clear understanding of what these clamps are and what they are used for, will you explain generally what are the various uses for sheet metal clamps?

A. Well, one of the principal uses is in the aircraft industry, where complete fuselage and wings, the sheet metal, the covering over those wings is assembled in place completely with these clamps

(Testimony of E. R. Livingston.)

prior to the placing of rivets. A clamp of this nature is placed in about every fourth or fifth rivet hole, so that thousands of these clamps are used in the complete assembly of the particular part of the plane that is being prepared for the riveting operation.

The Court: Now, you referred to clamps. Which exhibit is that, the clamp itself?

The Witness: Well, either of these Exhibits 5, 6 or 7; clamps of that general nature.

The Court: Let me see them, please.

(The exhibits were handed to the court.)

Q. (By Mr. Mason): I hand you the catalog, Exhibit No. 8, and ask if there is any illustration of the use of clamps in that catalog?

A. I haven't finished with that other answer, if you want me to.

In addition to the use in aircraft, they are also used by the automobile industry in the fabrication of bodies; and [20] in refrigeration plants and in the manufacture of Pullman cars or buses, trailers, in fact, any industry where sheet metal is attached to a structural member and held together prior to a riveting operation. So it covers a great many industries.

Q. Now, I show you the catalog, Exhibit No. 8, and ask you if that contains any illustrations of the use of clamps of this kind.

A. Yes, it does.

Q. You are referring to the illustration on Page 3?

(Testimony of E. R. Livingston.)

A. Page 3 shows a picture of a wing assembly with the clamps inserted in the rivet holes prior to the riveting operation. That picture, by the way, was taken out at the Douglas Aircraft plant of an actual ship under production.

The Court: May I see it?

(The document referred to was handed to the court.)

The Court: What portion of Exhibits 5, 6 or 7 is left in the plate, in the covering?

The Witness: What you see in the picture there, your Honor, is the entire clamp, that is, the two pinheads and the spreader are locked on the other side of the sheet.

The Court: Yes, I understand that.

The Witness: This stays in the drilled hole prior to riveting. Then as the rivets are put in, these are withdrawn and replaced by solid riveting. [21]

The Court: That is what I wanted to get clear.

The Witness: The entire assembly is put together with these clamps without rivets. Then they get ready for the riveting operation, and as they proceed from one row to another, there is one man who pulls the clamps out, and they are replaced permanently by the rivets.

The Court: What is the purpose of inserting these first? To keep the form correct?

The Witness: To prepare the work for riveting, to completely stretch the sheet metal skin. It is aluminum sheet. Of course, it is a big piece of alumi-

(Testimony of E. R. Livingston.)

num sheet, which is very awkward to handle, and it holds the whole thing in place in a solid position prior to the riveting operation.

The Court: Yes, I understand.

The Witness: And it holds it down tightly to the rib structure underneath the sheet.

The Court: I see.

The Witness: There are thousands of rivet holes in each one of these sheets.

Q. (By Mr. Mason): Does that clamp also hold the rivet holes in alignment?

A. That is correct, and minimizes—the more clamps they put in, it minimizes the shifting of the sheet over the frame and holds it in perfect registration. That is why they put them in every fourth or fifth rivet hole, to minimize the [22] shift of the sheet, so that the aluminum sheet metal is held in registration. And they also perform additional drilling operations after the sheet is in place, prior to riveting.

Mr. F. W. Lyon: You could sum it up by stating that these clamps act like a basting thread in the making of clothes, that it holds the thing in a vise while you are putting the permanent stitches in it?

The Witness: That is right.

The Court: And these clamps are then removed for further use?

The Witness: For further use, yes.

The Court: All right.

Q. (By Mr. Mason): Now, you are familiar with the type of sheet metal clamp that was in use

(Testimony of E. R. Livingston.)

prior to the time that the Monogram Manufacturing Company brought out this clamp, Exhibit 5?

A. Yes. The clamp that was in universal use at that time, which was in March of 1941, was manufactured by the Cleveland Tool Company, and was called the Cleco clamp, which was a trade name of the Cleveland Tool Company. A clamp of this same general type was also being manufactured by the F. & H. Manufacturing Company.

Q. I show you Exhibit 13 and ask you if that is the clamp to which you have referred.

A. Yes, this is the old type. [23]

The Court: Exhibit what?

Mr. Mason: Exhibit 13.

The Witness: Exhibit 13.

The Court: All right.

The Witness: This is the old type of Cleco clamp that was on the market at that time.

Q. (By Mr. Mason): Now, will you describe that clamp and explain how it is used?

A. Well, this clamp comprises an outer body, and I call it a pin, a stationary pin, which projects outwardly from the face of the body. Assembled in that body is a locking pin member, which is actuated by a spring, which protracts and retracts this locking pin through the drilled hole in the sheet. In order to apply this clamp, this large head of the locking pin has to be first angled into the hole, slid over to the right to accommodate the entering of the stationary pin which projects outwardly from the body, to also go into the drilled hole, and when

(Testimony of E. R. Livingston.)

in that position the spring is released and the locking pin with this expanded head here comes back and locks; increases its diameter, you might say, on the opposite side of the drilled hole, and it is locked so that it can't pull through, and it holds the sheet in place in proportion to the spring pressure that is applied. That is a very difficult clamp to apply. It also produces a one-sided clamping action on one side of the hole, and that clamping [24] action is not evenly distributed or shared on either side of the drilled hole.

Q. Now, are there any differences in the application and use of that clamp, as compared with the Monogram clamp in Exhibits 5, 6 or 7?

A. Well, the fundamental difference of the Monogram clamp is two clamping pins are used, which provides a two-sided clamping pressure on the skins being held in place, and it also can be inserted and withdrawn on a horizontal straight line with ease. These two clamping pins are protracted and retracted by the spring. As these two heads——

The Court: Just a moment. Now, when you go from one clamp to the other, you will have to show in the record the exhibit number, so that it will not be confusing. Will you strike out that answer and repeat the question of counsel?

(The question referred to was read by the reporter as follows:

“Now, are there any differences in the application and use of that clamp”——)

(Testimony of E. R. Livingston.)

The Court: Now, that clamp is Exhibit No. 13?

The Witness: Exhibit 13.

The Court: Proceed from there.

The Witness: Well, the principal differences between the clamp, Cleco clamp shown in Exhibit 13, and the Monogram clamp in Exhibit 6 is that whereas the Cleco clamp in Exhibit 13 [25] uses a single contracting pin, Exhibit 6, the Monogram clamp uses two contracting pins. These two clamping pins of the Monogram clamp are protracted and retracted by a spring, and they move relative to a fixed spreader between the two clamping pins. As these two clamping pins are protracted, the heads of the pins extend beyond the end of the fixed spread, reducing the diameter to a diameter less than the drilled hole into which they are to be inserted. When the spring retracts, the pins are spread apart by the fixed spreader. The total thickness of the diameter of the two heads of the pins, plus the thickness of the spreader, creates a diameter which is greater than the drilled hole on the opposite side of the drilled hole, so that it comes back and locks securely, and applies a clamping pressure on both sides of the drilled hole, as compared with one side of the drilled hole, as shown by the Cleco clamp in Exhibit 13.

This Monogram clamp in Exhibit 6 is very easy to insert and withdraw from the drilled hole, as it is inserted in a completely horizontal motion, and it does not have to be angled to let the needle heads, the clamping pin heads, go through the drilled hole.

(Testimony of E. R. Livingston.)

The Court: To penetrate the drilled hole?

The Witness: That is right. It is pushed right in like threading a needle. It is pushed straight in instead of having to be angled in. [26]

Q. (By Mr. Mason): I notice that in Exhibit 6 the spring was not exposed, but in Exhibit 13 the spring is exposed. What difference does that make, if any?

A. That is a very important difference between the Cleco clamp in Exhibit 13 and the Monogram clamp in Exhibit 6. The Cleco clamp in Exhibit 13 provides no means for securely holding the spring, and the clamping needles inside the body, in the event that any one of those component parts should break and by the force of the spring pressure project those component parts through the air and possibly endanger the workmen. During the war there were a great many accidents like that occurring, of workmen losing their eyes in aircraft plants, where in walking along the panel of the wing assembly, all of a sudden a clamp would come flying through the air with about 165 pounds of spring pressure behind it and hit the persons and put their eyes out.

The Monogram clamp in Exhibit No. 6 provides a means of locking these component parts which are actuated by the spring pressure inside the body of the clamp. A plunger is provided, which has a shoulder which goes in the body of the clamp, and the rear body of the clamp, with a flange in the back, is crimped over the shoulder, so the plunger cannot possibly come back. So if the needle heads here

(Testimony of E. R. Livingston.)

through wear, or breakage in usage, would break, this clamp would merely drop out of the hole and the spring pressure would not project those [27] component parts through the air.

Q. Now, will you refer to Exhibit No. 7 and point out the differences?

A. Exhibit No. 7 is a class of clamp similar to Exhibit No. 6, the main difference being that this retaining plunger which I spoke of is also encased entirely inside the body of the clamp and does not project, so that all the component parts of the clamp are completely housed in the body, and the rear of the body is clamped over, sealing them all in in a solid, you might say, a solid cylinder.

Q. How do you project those clamping pins from the body? Do you use a tool for that purpose?

A. Oh, yes. The clamp is operated with a clamp-applying tool.

Q. Are you referring to a device like Exhibit No. 15?

A. Yes, that is what is known as the Monogram universal gun for applying clamps of this general nature.

Q. Now, will you take Exhibit No. 15 and insert in that gun Exhibit 7, and demonstrate to the court what you are doing, and explain it as you go along for the record.

A. I am holding Exhibit 7 in my left hand and dropping that into the receiving channel of Exhibit 15.

(Testimony of E. R. Livingston.)

The Court: I believe that is the first mention we have had of Exhibit 15 in your testimony.

The Witness: 15 is the gun. [28]

The Court: All right.

The Witness: The gun is so designed that when the clamp is slipped in there, and the tool is operated, that the clamp cannot come out.

Q. (By Mr. Mason): Will you explain how that happens?

A. Well, the front diameter of the clamp itself is less than the rear diameter of the clamp body. This difference in diameters permits the clamp to go under raised ears in the clamp-applying tool, so that when that is slipped under there, the clamp has no possible chance of coming out while the tool is being operated. They can't possibly come out, you see. It is locked in place, in other words, before the tool is operated, and cannot fly out of the gun.

Q. As I understand it, as you pull the trigger on that gun, that causes the plunger to enter the body of the clamp and project the clamp?

A. And project the pins and compress the spring.

Q. When you release the pressure applied by the gun, what happens?

A. The clamping pins retract.

Q. I believe in your testimony a little while ago you stated the spring was used to protract the pin. You mean they are manually protracted by pressing the spring?

A. That's right.

(Testimony of E. R. Livingston.)

Mr. F. W. Lyon: Your Honor, I don't know about this gun, [29] and I believe statements should be made that there is nothing in the suit which refers to the gun, that it is just an applying tool to project the clamps.

Mr. Mason: That is correct, your Honor. They are merely referred to to demonstrate how the clamps are used.

Mr. F. W. Lyon: The gun has nothing to do with the patents in suit.

Mr. Mason: That is correct.

Q. (By Mr. Mason): At the time that Monogram commenced manufacturing this clamp, Exhibit 5, to your knowledge——

The Court: Now, let me get this clear, in view of Mr. Lyon's statement. This witness has gone into some detail in showing the fitting in of this Exhibit 5, 6 and 7, or an instrument similar, into this particular gun which is marked Exhibit 15, to show that there is no possibility of flying out because of the fact that the construction of the gun prohibited the clamp from coming out. That has nothing to do with the suit, then, is that correct?

Mr. Mason: Yes, your Honor. He merely brought that in incidentally to explain the use of it. That happens to be a feature, a patented feature of this gun, that is not involved in this case at all.

The Court: Yes. I asked that because of the emphasis both in your opening statement and that this witness made, to the fact that so many people were injured. [30]

(Testimony of E. R. Livingston.)

Mr. Mason: That was one element which is not involved in this case. The only element of injuries which we are referring to is after the clamps are in.

The Court: After they are inserted in place, then the contention of the witness and yours——

Mr. Mason: That is right.

The Court: ——is that they are less liable to spring out and strike a person?

Mr. Mason: That is right.

Mr. F. W. Lyon: It is not while they are in the gun that we are interested in.

The Court: No. I have that clear.

Q. (By Mr. Mason): At the time that Monogram Manufacturing Company commenced manufacturing these clamps, as exemplified by Exhibit 5, to your knowledge, was there any other clamp on the market in which a pair of clamping pins were projected from the body relative to a spreader bar, which had one of its legs extending outwardly from the body between those pins?

A. There was no clamp——

Mr. F. W. Lyon: That is objected to, your Honor, as no foundation laid. He hasn't stated what that time is that his knowledge refers to.

Mr. Mason: He stated when he commenced manufacturing.

The Court: That was in March, 1941, when he started to [31] manufacture.

Mr. F. W. Lyon: All right. I just want the date.

The Court: Yes.

(Testimony of E. R. Livingston.)

Q. (By Mr. Mason): Did you answer that question?

A. No, I haven't. No, there was no clamp of that type being manufactured in March of 1941.

Q. Are you familiar with the clamp device manufactured by the defendant in this case?

A. Yes, generally.

Q. I show you Plaintiffs' Exhibit 10, which has been——

The Court: Before you go into that, Mr. Mason, while I understand Mr. Lyon says that the catalog was printed some time after all of this——

Mr. F. W. Lyon: That shows right on it, your Honor.

The Court: ——I wondered this: On Page 5 of the catalog introduced or marked for identification, there is a sketch here of these clamps. I would like to ask the witness if they are the same clamps that are in evidence here as Exhibits 5, 6 and 7. You can all look at this, counsel.

Mr. F. W. Lyon: Now, where is Exhibit 5?

The Witness: This one here.

The Court: There are three in different positions.

The Witness: This is exactly the same clamp, your Honor, with the exception of the rear assembly of the pins in Exhibit 5. Here we use a solid bushing, whereas a different [32] type of assembly is used to hold the pins in the back. But the two pins and the fixed spreader and the cap are identical with Exhibit 5. [33]

(Testimony of E. R. Livingston.)

The Court: Now, let me get it clear. Looking at page 5 of Exhibit 8 for identification, and looking at the black background A is the start of the penetration, is it not?

The Witness: That is correct.

The Court: And the spring seems to be compressed there?

The Witness: Yes.

The Court: And in B, it shows a further penetration of it—what do you call these two?

The Witness: Locking pins.

The Court: Of the locking pins?

The Witness: Which shows the spring release, your Honor.

The Court: That is what I am getting at.

The Witness: With the locking pins' heads locked against the other side.

The Court: What does C do to it?

The Witness: This illustrates the assembly of the needles inside the body of the clamp.

Mr. F. W. Lyon: You mean what you call the locking pins, don't you?

The Witness: Yes.

The Court: Oh, yes. They have nothing to do with the final operation?

The Witness: No. This is a sub-assembly that goes in to make up this assembly. [34]

The Court: Yes. That is what I wanted to get clear.

Mr. Mason: The spreader is not shown in C.

The Witness: If your Honor will note, the

(Testimony of E. R. Livingston.)

spreaders here have a slight toe-in which lets these heads come together when they have penetrated the work.

The Court: And then open?

The Witness: And when they come back, the spreader between them opens them out.

The Court: And catches on the inner wall?

The Witness: And catches on the other side of the work.

The Court: Yes.

Q. (By Mr. Mason): I show you Exhibit 10, which is one of the defendant's clamps, and ask you if you recognize that?

A. Yes; I do.

Q. I will ask you to refer to plaintiffs' clamp Exhibit 5, and point out there again what differences there are that are visible to you.

Mr. F. W. Lyon: Your Honor, I object to this as immaterial. What the plaintiff manufactured, in comparison with what the defendant manufactured, has no relation to what the patent describes. There is no foundation for this line of testimony, that either of these devices are anywhere near the patent in suit. He is describing this purely problematically in so far as the court is concerned. [35]

Mr. Mason: Your Honor, that clamp, Exhibit 10, is not charged to infringe. My purpose in asking the question——

Mr. F. W. Lyon: Only that——

The Court: Now, wait until he finishes.

Mr. F. W. Lyon: Pardon me.

(Testimony of E. R. Livingston.)

Mr. Mason: My purpose in asking the question was to bring out any of the differences to which the patent relates over that clamp which does not infringe. Of course, I am going to do that by the expert, and I merely wanted the court to have full understanding of it as early in the case as I could.

The Court: With that statement, counsel, I cannot see any prejudice. All right.

A. Well, the difference between plaintiffs' Exhibit 5 and Defendant's Exhibit 10—let me change this. The similarity of these two exhibits is that they both have the locking pins and the fixed spreader. However, Plaintiffs' Exhibit 5 has a cap construction on the end of the body; whereas, the front of the body on Exhibit 10 is solid, with no cap construction. The rear of the clamp in Exhibit 10, the two locking pins, are held in a retaining bushing of some type by a wedge, and in Exhibit, Plaintiffs' Exhibit 5, this wedge construction is not used.

Q. (By Mr. Mason): How is the spreader mounted in Exhibit 10 and how is it mounted in Exhibit 5? [36]

A. Well, the Exhibit 10, the spreader is mounted with the "T" part of the spreader inside the outer face of the body, the solid body; whereas, in Exhibit 5, the "T" part of the spreader is between the face of the body and the cap which holds the spreader in place.

Q. Does that make any difference in the manufacture of those devices?

(Testimony of E. R. Livingston.)

A. Yes. The clamp shown by Exhibit A is a very cheap and economical clamp to assemble.

Q. You mean Exhibit 5?

A. Exhibit 5, yes; whereas, the clamp in Exhibit 10 is must more costly to assemble.

Q. Why is that?

Mr. F. W. Lyon: I object to this testimony, as the witness is not qualified as an expert machinist or anything else, nor that he knows the cost of the defendant's manufacture or anything else. He is merely stating that it is cheaper.

The Court: There is no foundation laid, if counsel makes that objection.

Q. (By Mr. Mason): Mr. Livingston, what are your duties with the Monogram Company?

A. I am the vice-president and general manager of the company.

Q. In that work do you have any direct supervision [37] over the manufacture of these clamps?

A. Yes; I do.

Q. Do you have occasion to watch their assembly?

A. Yes; I do.

Q. Have you ever done any of the assembly work yourself?

A. Yes; I have.

Q. Then you know how they are assembled?

A. That is correct.

Q. I will ask you if the Monogram Company has ever made any clamps of the type of Exhibit 10 wherein there is no separate cap on the end of the body, but merely an integral end wall on the body

(Testimony of E. R. Livingston.)

and in which the spreader bar is mounted inside the body and projected outwardly through the hole in the end wall between the pins?

A. Yes; we have made a clamp of that type.

Q. Will you explain your statement that there are differences in the cost of manufacturing Exhibit 5 and the cost of manufacturing the clamp of the type of Exhibit 10?

Mr. F. W. Lyon: I object to that, your Honor. He has stated that he has never been in the manufacture of the type like 10. How can he know the cost of it?

The Witness: I said we did.

The Court: He did make them.

Mr. F. W. Lyon: He only made the one with the cap, he said. [38]

Mr. Mason: I want the record read. He did say that, however.

The Witness: I have made both types.

Mr. F. W. Lyon: Well, if he testified he made both types, I withdraw the objection.

The Court: Yes. Proceed.

The Witness: Will you repeat your question, Mr. Mason?

Mr. Mason: Will you read the question?

(Question read by the reporter.)

A. Well, our actual experience in the assembly of the two types of clamps shown in Exhibit 5 and Exhibit 10 is that the clamp similar to the type in Exhibit 10 takes three times as long to assemble as

(Testimony of E. R. Livingston.)

the clamp in Exhibit 5. The construction of the clamp shown in Exhibit 10 is such that the two needles, the two clamping pins, can be all projected through the hole in the front body of the clamp so that they project outwardly from the body of the clamp. The T spreader is then merely inserted between those two clamping pins, the cap slipped over the top, and the spring is released and pulls that cap back tight to the end of the body which is then crimped and holds the complete assembly in place.

In the clamp shown in Exhibit 10 the spreader has to be held between the two needles or clamping pins, with one clamping pin longer than the other, so that both heads of the clamping pins can be slipped through the body of the clamp, [39] and then the spreader slipped through the hole after those heads have gone through, which is a very tedious and painstaking operation.

Q. As I understand your statement, then, in assembling the clamp of Exhibit 10 you have to insert the spreader from the inside of the clamp; whereas, in Exhibit 5 you merely insert the spreader after the pins have been applied and made the opposite end of the body?

A. That is correct.

Q. After which you apply the cap?

A. That is correct.

Q. Now, do you, if you know and do not mind stating it—or can you state approximately how many of these skin clamps have been manufactured

(Testimony of E. R. Livingston.)

and sold by Monogram Manufacturing Company since March, 1941?

A. We have made over 50 million.

Mr. F. W. Lyon: Objected to as immaterial, your Honor. There is no tie-up of any of these clamps related to the facts in suit; no foundation.

The Court: Well, that can only be developed. At this time I do not suppose we could determine that, could we, counsel, until we hear the evidence as to whether or not these specifications are such as these were manufactured under?

Mr. F. W. Lyon: I have no objection to him testifying [40] to how many of these particular devices were sold.

The Court: Yes.

Mr. F. W. Lyon: But there is no tie-up to the suit.

The Court: Yes; all right.

A. We have manufactured and sold over 50,000,000.

Q. (By Mr. Mason): Now, when you say you have manufactured and sold over 50,00,000 do you mean of the clamps as exemplified by Exhibits 5, 6, and 7? A. Yes.

Q. Does that 50,000,000 also include other clamps?

A. But they had practically the same construction as this type of clamp.

Q. That is, you are referring to Exhibit 5?

The Court: 5, 6, and 7.

A. 5, 6, and 7.

(Testimony of E. R. Livingston.)

Mr. Mason: Yes.

Q. At what price does Monogram sell these clamps?

A. From six to eight cents.

Q. From six to eight cents each?

A. To eight cents; yes, sir.

Q. Do you know whether or not this Cleco type of clamp, Exhibit 13, is still being sold?

A. No. Since this new type of Monogram clamp was put on the market, the Cleco type clamp became obsolete and we never see them any more. [41]

Mr. Mason: That is all.

Cross-Examination

By Mr. F. W. Lyon:

Q. Mr. Livingston, you testified that you first manufactured devices similar to Exhibit 5 in March of 1941?

A. We started to manufacture in March of 1941.

Q. When did you first sell clamps exemplified by Exhibit 5?

A. Just shortly thereafter.

Q. A month or so?

A. About a month; yes.

Q. Were you familiar with any other type of clamp on the market prior to that time than the Cleco Exhibit 13?

A. The two clamps I knew of was the Cleco, Exhibit 13, and a similar type of clamp made by the F. & H. Manufacturing Company.

(Testimony of E. R. Livingston.)

Q. Have you any exhibits of that last mentioned clamp?

A. Not in front of me; no.

Q. I will show you a clamp——

The Court: Mark it, will you, please, first?

Mr. F. W. Lyon: Yes; Defendant's Exhibit A.

The Clerk: That will be Defendant's Exhibit A for identification.

Q. (By Mr. F. W. Lyon): ——and ask you if that is the [42] type of clamp you referred to?

A. Well, the exact model of clamp that I recall had a twisted curved member that came out here.

Q. In other words, the movable wire—this is the movable wire sticking out here? A. Yes.

Q. ——curved the other direction in the ones you knew of?

A. Directly away from this fixed pin.

Q. And that is the only clamp you were familiar with?

A. That was in March of 1941, that is all.

Mr. F. W. Lyon: But that one. I will ask the clerk to mark this Exhibit B.

The Clerk: This will be Defendant's Exhibit B for identification.

Q. (By Mr. F. W. Lyon): I show you Defendant's Exhibit B; is that the clamp you referred to as being the other one besides the Cleco?

A. Yes; it was similar to this type of clamp.

Mr. F. W. Lyon: I offer that in evidence as Defendant's Exhibit B.

The Court: . Admitted:

(Testimony of E. R. Livingston.)

The Clerk: Defendant's Exhibit B admitted into evidence.

Q. (By Mr. F. W. Lyon): Were you familiar with a clamp which had the pins, pair of pins, [43] with projections on them similar to Exhibit 5, which had a bar spreader inside of the body, prior to March, 1941? A. No.

Q. You testified that the Monogram Manufacturing Company produced a clamp with a solid body, that is without the end cup on the end of it. Have you any samples of that device?

A. I don't know?

The Court: What is that, Mr. Mason?

Mr. F. W. Lyon: I will ask that that be introduced into evidence as Defendant's next number.

The Court: C.

Mr. F. W. Lyon: C.

The Court: Exhibit C, what was it Mr. Mason?

Mr. Mason: That is a clamp made by Monogram without the end cap similar to Exhibit 10.

Q. (By Mr. F. W. Lyon): Did Monogram Manufacturing Company make any quantity of this type and sell the same?

A. Not a large quantity; no.

Q. What do you mean by "a large quantity"?

A. Could I see it?

Q. That is Exhibit C.

A. Well, originally we made up sleeves on this solid type of sleeve here that was being used experimentally for a different type of clamp. Our particular problem at the time [44] that this clamp here

(Testimony of E. R. Livingston.)

was made was making a clamp of a greater material capacity than 3/16ths. This clamp, Exhibit C, is for a 5/16ths material capacity. And we were requested by the Brewster Company in the east to develop a clamp for 5/16th up to half-inch where the spreader would not project so far out in front of the body of the clamp, for the danger it would be broken off very easily in the operation. And we experimented with a moving spreader at that time, which theoretically could be worked out so that the spreader moved with the moving action of the needles and adjusted itself to the thickness of the material. That did not prove successful and we had a considerable number of these sleeves here on hand, and we utilized these solid sleeves for the manufacture of the type of clamp disclosed in Exhibit C until those sleeves were disposed of. Then we went back to a manufacture of our heavy-duty clamps or for 5/16ths material, using what I will say is the conventional type of spreader and cap assembly, because these clamps here cost us so much to assemble. They were taking three times to assemble this type of clamp as compared to our conventional type of cap and spreader assembly.

Q. Approximately how many of the type of Exhibit C did you make?

A. I couldn't tell you that exactly.

Q. The type similar to Exhibit 5 you made by the millions? [45]

A. That is right.

Q. Did you make a thousand of Exhibit C?

(Testimony of E. R. Livingston.)

A. Oh, we probably made more than a thousand.

Q. Well, approximately? Could you approximate in any way somewhere between a million and zero?

A. I couldn't tell you within—well, it would just be a wild guess on how many we made of that particular type. What I know is we had all kinds of trouble in there for several weeks, before we decided to change back to the old type of assembly.

Q. At the same time, you were making the other type? A. That is right.

Q. Of Exhibit 5?

A. That is right. We had too much trouble with them so we changed it over.

Q. Then you have never developed the jigs and dies, etc., necessarily to properly assemble Exhibit C?

Mr. Mason: I object to that as calling for a conclusion as to what would be the proper method of assembly.

The Court: If the witness can give any statement on it, I will hear it. Repeat the question so the witness understands it.

(Question read by the reporter.)

A. I don't know what counsel means by an assembly die. [46]

Mr. F. W. Lyon: Or jigs, then, put it.

A. Yes; we had this set up on our assembly line with the proper jigs necessary to assemble it.

Q. Will you describe those jigs?

(Testimony of E. R. Livingston.)

The Court: Is that material, Mr. Lyon, as long as we have the product here?

Mr. F. W. Lyon: Yes, your Honor.

The Court: There must have been a jig that would make that product.

Mr. F. W. Lyon: Your Honor, I intended to prove that any one of these types can be made and assembled at exactly the same price in the world. This witness has testified that it took them three times longer, and I want to know why.

The Court: All right. I see your point. Proceed.

A. Well, the two clamping needles and the spreader had to be held between the fingers of a girl assembling this clamp to get those two heads through the hole. Then the rest of the clamp was assembled in a regular conventional fixture.

Q. (By Mr. F. W. Lyon): And you had no jig——

A. Wait a minute. When that was assembled in that fixture and this spring was in a compressed position, these two clamping pins here projected out of this retaining member in the back of the spring assembly, and those two clamping pins had to be pried apart in order to get that wedge between [47] them, which was a very slow operation.

Q. In other words, you had no jig for putting the clamping pins and spreader through the body by mechanical operation? A. No.

Mr. F. W. Lyon: I think that is all, your Honor.

Mr. Mason: That is all.

The Court: That is all. Call your next witness.

Mr. Mason: I will call Mr. Mattingly. If your Honor please, may we have a recess so we can mount some exhibits on the board here, some charts?

The Court: Yes. It is time for our afternoon recess.

(Short recess.)

The Court: Proceed, gentlemen.

Mr. Mason: Mr. Mattingly, will you take the stand?

HAROLD W. MATTINGLY

called as a witness by plaintiffs, being first duly sworn, was examined and testified as follows:

The Clerk: And your full name?

The Witness: Harold W. Mattingly.

Direct Examination

By Mr. Mason:

Q. What is your profession, Mr. Mattingly?

A. I am an attorney at law, specializing in the practice of patent law in the City of Los Angeles.

Q. And how long have you been practicing?

A. Since approximately 1923.

Mr. Mason: Mr. Lyon, do you stipulate as to Mr. Mattingly's qualifications as an expert in this case, or do you wish me to examine him?

Mr. F. W. Lyon: As an expert on patents and patent law, yes, your Honor, that he can read and described what is on the patents.

(Testimony of Harold W. Mattingly.)

The Court: Proceed.

Q. (By Mr. Mason): Have you made any study or have you had any experience in sheet metal clamping art?

A. Yes. I have had occasion to study a number of the sheet metal clamps which have been used for the purpose of holding sheet metal sheets in place prior to riveting and, among other things, I acted as an expert witness in a case in the Southern District of California, the Monogram Company versus F. & H. Company, which was tried in 1943, I believe.

Q. Have you seen these clamps assembled?

A. I have.

Q. Have you seen them in use?

A. I have.

Q. Have you studied the patents in suit Nos. 2,365,787 and 2,364,408? [49]

A. I have.

Q. Are you familiar with them? A. Yes.

Q. These patents relate to sheet metal clamps. Will you explain the purposes and uses of sheet metal clamps?

A. Sheet metal clamps of the type described in the patents in suit are used as a means of temporarily holding sheets of metal which have been drilled with holes for the reception of rivets in place on other sheets which have been previously drilled, ready for riveting, or upon the supporting structures to which those sheets are to be attached and in which supporting structures holes have previously been drilled through which rivets are to

(Testimony of Harold W. Mattingly.)

be inserted for the purpose of securing the sheets to the supporting structures. The temporary clamps of this type are used in the initial assembly of the sheets on the supporting structure, the temporary clamps being inserted through certain ones of the previously drilled holes to hold the sheet in place with all of the rivet holes of the sheets aligned with corresponding rivet holes in the supporting structure, to thereby not only hold the sheet in place, but to align the rivet holes in the sheets with the rivet holes in the supporting structure during the insertion and riveting of the permanent rivets which are to be used after the permanent rivets have been inserted in the sheets and the supporting structure, and riveted in the [50] balance of the holes not occupied by the temporary clamps. The temporary clamps are removed and the remaining rivet holes are filled with rivets to complete the assembly of the sheet and the supporting structure.

Q. Have you examined and are you familiar with the clamps of the defendant charged to infringe in this case, Exhibits 11 and 12, as well as Exhibits 11-A and 12-A? A. I have.

Q. And are you also familiar with the defendant's clamp, Exhibit 10?

A. I am familiar with that clamp.

Q. Have you made any charts for use in illustrating your testimony here today?

A. I have.

Q. Are these charts on the board here?

A. Yes.

Mr. Mason: I would like to have these marked for identification, if your Honor please, as Exhibits 16 to 22, inclusive.

The Court: They may be so marked.

Q. (By Mr. Mason): First, I will ask you to refer to patent in suit, Exhibit No. 1; it is patent No. '787; and by using your charts, as well as any of the clamp devices as you may wish, explain to the court the structure of this patent. [51]

A. In patent '787, Exhibit 1, there is described and illustrated a temporary clamp assembly in which the clamp is constructed—if I may step down to the easel here—the clamp is constructed of a body member——

Q. Now, you are referring to what exhibit?

A. ——which is illustrated on Exhibit 16 as a cylindrical outer member to which the reference character 10 has been applied on Exhibit 16, and that is the same reference character that is used in the patent, Exhibit 1, to identify that body. The body 10 is hollow, it is open at its inner end and it is closed at its outer end or lower end, as illustrated in Exhibit 16, by a solid end wall which is integral with the side walls of the body. The end wall of the body is formed with a central opening bored through it, through which is projected a retaining member or assembly, indicated in Exhibit 16 by the reference character 19. That assembly comprises a pair of retaining pins, one on each side of center, the inner ends of which are held together by means of a washer, which does not have a reference character on the drawing, Exhibit 16,

(Testimony of Harold W. Mattingly.)

but which bears the reference character 20 in Figure 1 of the patent, Exhibit 1.

Q. Will you denote that on the drawing in pencil?

A. I will mark Exhibit 16 with the reference character 20 directed to the washer I have just identified.

The retaining pin assembly 19 includes a pair of enlarged [52] pin ends, one formed on each of the pins that go to make up the pin assembly 19, those enlarged ends having been inserted and projected through the central pin in the end wall of the body. The pins, or the enlarged pin ends, are separated from each other by means of a spreader which is indicated by the reference character 25 in Exhibit 16 and by the same reference character 25 in the patent, Exhibit 1.

The spreader 25 is illustrated in the patent as comprising a substantially T-shaped piece of metal, the projecting arms of which are received in a slot which is formed in the outer end of the solid end wall of the housing or body 10, and over the ends of the spreader and between the arms of the spreader and the enlarged ends of the retaining pins 19 there is mounted a cap 27, shown on Exhibit 16, and also referred to as 27 in the patent, Exhibit 1, the cap 27 being made in the form of a cup which is placed over the solid end of the body, and then the upper edge of the cap is rolled or crimped or compressed into a groove which is formed on the side of the body No. 10.

(Testimony of Harold W. Mattingly.)

Q. What is the purpose of that cap?

A. The purpose of the cap is two-fold. Its first function is to hold the spreader 25 assembled on the end of the body, to keep it from falling off of the body and becoming disassembled from the body. Its second function is to cover over the end wall of the body 10 and, with its smooth outer surface, provide a smooth surface which will engage [53] the outer surface of the work sheet to which the clamp is to be applied.

Q. In the course of assembling that clamp, will you state the sequence of operations and state the significance of the cap in that respect, if there is any?

A. I believe that——

Mr. F. W. Lyon: If your Honor please, I object to this testimony. Nowhere in the patents is there any statement concerning the method of assembly of these devices, nor is there any suggestion of any assembly. If he is testifying as to how they actually do it, that is one thing; but, as to him testifying as to how the patent teaches it, that is another matter.

Mr. Mason: If your Honor please, the patentee is entitled to all the advantages to which the structure shown in the clamp may be put. It may be necessary to state any particular method of assembly. I want the witness merely to explain to the court what he knows about the way that the clamp is assembled, so that your Honor may have a clear understanding of it.

(Testimony of Harold W. Mattingly.)

Mr. F. W. Lyon: If it is limited that way, I withdraw the objection.

The Court: There is no objection to that procedure. Proceed, Mr. Mattingly. [54]

A. The assembly of the type of structure shown in Exhibit 16 and in the patent, Exhibit 1, is best illustrated in the drawing, Exhibit 20, which I have had prepared to show the theories of successive steps employed in the assembly of the clamp.

In Figure 1 of Exhibit 20 I have illustrated the component parts of a clamp of this type as comprising a pair of retaining pins——

Q. (By Mr. Mason): Will you give those a reference character?

A. I will call these two pins and mark them with the letter A; another of the component parts is a spring, which I will mark B; another of the component parts is a body, which I will mark C; another of the component parts is a T-shaped spreader, which I will mark D; and another of the parts is the cap, which I will mark E.

In the particular form of clamp illustrated in Exhibit 20, the pins are to be retained, that is the inner ends of the pins are to be retained assembled together, by means of a washer, which I will mark E (F); and in this particular form illustrated here, the two pins A have their inner ends spread apart to fill the circular opening in the washer E (F) by means of a little strip of metal, which I will mark——

(Testimony of Harold W. Mattingly.)

The Reporter: You have got two "E's" now.

A. I beg your pardon. May we mark the washer as F and the strip of metal I just identified as G.

The type of assembly illustrated in Exhibit 20 is that exemplified by Exhibit 5 with the parts A to G as illustrated in Exhibit 20. The start of the assembly is to make a sub-assembly of the pin or retaining pin unit. The first step is illustrated in Figure 2, where the two pins A have been placed face to face and the strip of metal G has been inserted in the inner ends—between the inner ends of the pins A.

The washer F is ready now to be slipped over the ends of the pins to hold them together in a unit, which is illustrated in Figure 3. The next step in the assembly is to place the spring B about this unit which has just been assembled, and that makes the assembly ready to receive the body C. The body C has the internal bore similar to that illustrated in Exhibit 16 to receive the spring and the pin assembly.

Now, the body is illustrated in Exhibit 20 as having a relatively fair-sized opening in its outer end which is ample to receive and pass the enlarged heads of the pins, as long as they are not spread apart by the spreader, so that the assembly of the spring, pin, and body can be readily accomplished merely by pressing the pins on through the body from the inner end of the body, which, as I pointed out, is open as illustrated in Exhibit 16.

(Testimony of Harold W. Mattingly.)

In Figure 5 I have shown the operation which has occurred upon the compression of the spring by forcing this pin [56] assembly through the hole in the outer end of the body; and I have illustrated here, diagrammatically, a jig which will accomplish that, as comprising one member, which I will mark H, to engage and hold the body while a plunger, which I will mark P, is forced upwardly to project the pin assembly through the body.

After the parts are in the position as shown in Figure 5, it will be noted that the pins or the clamped ends of the pins have been projected some considerable distance beyond the outer end of the body, so that at that time the spreader D may be inserted laterally in the space between the pin ends. That is the position that the parts assume when the pins are projected as in the normal operation of the clamp, with the operating tool or gun. With the pins in this projected position as shown in Figure 5, the spreader is merely inserted laterally through the space between the two pins. It rests on the outer end of the body, and the assembly is now ready to receive the cap which I have illustrated in Figure 6.

The cap can now be placed over the enlarged ends of the pins, because at this time it will be noted that the enlarged heads on the pins are now close together, and the total distance across the enlarged heads is equal to or less than the diameter of the hole in the cap E. The cap having been placed on over the outer projected ends of the

(Testimony of Harold W. Mattingly.)

assemble, as shown in Figure 7, the entire clamp has now been assembled and will hold itself together if the jig is released.

In Figure 8 I have illustrated the assembly as it stands at that stage of the proceedings. It is now capable of being taken out of the jig and all of the parts will hold themselves together.

In Figure 9 I have illustrated diagrammatically the [58] final operation, which is the crimping of the edges of the cap about the end of the body, and it will be noted that there is a shallow groove formed on the end of the body, so that the pieces of metal of the cap may be pressed in it, to secure the cap in place so that it will not fall off during the operation or the subsequent use of the assembled clamp.

Q. Are you familiar with the type of clamp structure exemplified by Plaintiffs' Exhibit 10, which is one of the defendant's devices, and by Defendant's Exhibit C, which is one of plaintiffs' devices? A. I am.

Q. Now, do you know how that clamp is assembled, that is, at least as to Defendant's Exhibit C.

A. Defendant's Exhibit C is assembled by a series of steps which I have illustrated in Exhibit 22.

Exhibit C distinguishes primarily from the type of clamp shown in Patent '787, Exhibit 1, and in Exhibit 16, and in the assembly views in Exhibit 20, by reason of the fact that the body of the clamp is formed with a solid end wall, having a center

(Testimony of Harold W. Mattingly.)

opening through the end wall, and the finished assembly does not apply a cap. Instead, the spreader D in the form of Exhibit 10 and Exhibit C, the cross arms of the spreader are located inside the body, and in order to assemble that structure it is necessary to assemble the spreader from the open end of the body. [59]

In Exhibit 2 I have illustrated in Figure 1 the component parts, which I will mark——

Mr. F. W. Lyon: These are the component parts of what device?

The Witness: The component parts of Exhibit 10.

Mr. F. W. Lyon: Exhibit 10 or Exhibit C.

The Witness: I might at this stage of the game say that the component parts of Exhibit 10 and Exhibit C are substantially alike, and I will make a comparison first as to Exhibit 10—I beg your pardon—first as to Exhibit C, and then as to Exhibit 10.

Mr. F. W. Lyon: Well, aren't you testifying as to how these are assembled?

The Witness: That is right.

Mr. F. W. Lyon: And Exhibit 10 and Exhibit C you have seen assembled, both of them, in this same manner?

Mr. Mason: I have asked him to testify as to the assembly of Exhibit C.

Mr. F. W. Lyon: That is what I thought, but he changed it to Exhibit 10.

(Testimony of Harold W. Mattingly.)

The Witness: May I check? Exhibit C is a Monogram structure, is it?

Mr. F. W. Lyon: That is right.

The Witness: Then this is Exhibit C I am comparing this with. Is that right? [60]

Q. (By Mr. Mason): Yes. You have seen that assembly?

A. Yes. The component parts of Exhibit C include the pins, which I will mark A, a piece of metal to be interposed between the inner ends of the pins A, which I will mark G, a cap member, or a tubular member, having an enlarged head, which I will mark F, corresponding substantially to the washer F shown on Exhibit 20, a spring which I will mark B, a spreader which I will mark D, a body which I mark C, a washer which I will mark M.

Now, in assembling this type of clamp, the first step is illustrated in Figure 2, in which the two pins A are held together, but the spreader D has been inserted in between the two pins and is held in place between those two pins by the friction of the two pins being placed together with that piece of metal in between them.

The assembly of that clamp may be finished by applying the washer M between the little enlargements on the ends of the pins and the cross bar of the spreader so that when that washer is finally pushed in, it will push the spreader on into the body, as I will point out in further steps of the operation.

(Testimony of Harold W. Mattingly.)

The body, as I have illustrated, has the center hole in it, through which the pins must project, and in order to facilitate those pins going through that small hole, it is usual to shift the pins longitudinally relative to each other, [61] as I have indicated in Figure 3.

Q. Why is that?

A. The two heads are approximately, that is, when they are exactly in alignment with each other, are approximately of the same width as the diameter of the hole they have to go through, and it is rather a ticklish job to insert a piece of metal of exactly the same size through a hole than it is if you can reduce the diameter and make them in a sense self-threading. That is shown in Figure 3.

In Figure 4 the pins have been projected through the hole in the body, and the assembly is now ready to receive the spring. During this portion of the assembly the spreader is still retracted well toward the inner ends of the pins, and it is necessary to move that spreader now on through the body, and attempt to project it through the hole at the end of the body and in the space between the projected ends of the pins. The spring is then placed over the inner ends of the pins, and the spring may then be forced on into the body a sufficient distance to frictionally move the spreader on through to project its long leg out through the hole and into the space between the two pin ends, and to bring the cross bar so that T-shaped spreader is

(Testimony of Harold W. Mattingly.)

against the inner surface of the end wall of the body.

Q. What prevents the longer arm of the spreader from shifting laterally and missing the hole as you push it down? [62]

A. There is nothing that prevents that except the attempt to apply the moving force evenly on both sides of the projecting arms of the spreader. In other words, you are hoping that it will remain in alignment and will go through the hole at the opposite end of the body.

Q. As I understand you, then, that operation which you described is necessary because you cannot insert the spreader and the headed ends of the pins through the small hole in the body at the same time?

A. That is correct. The only possibility is of attempting to hold the spreader as close to the ends, to the enlarged ends of the pins, as you can during the time the pins are being placed through the hole. They cannot be in their normal position out at the ends of the pins at the time of that assembly because the hole is not big enough for that assembly to go through.

Q. Whereas in the cap type of assembly, Exhibit 20, you can push the pins through in any way, and later apply the spreader from the other end; is that right?

A. That is correct, and you do not have any problem of attempting to hold a loose piece of

(Testimony of Harold W. Mattingly.)

metal loosely between two other pieces of metal, in attempting to make the assembly.

In Figure 5 I have illustrated the next step in the assembly, in which you will place about the inner ends of the pins some retaining member, which will hold those ends of the [63] pins together. In this illustration in Figure 5 the cap or plunger member F is placed over the inner ends of the pins, and the cap is then pressed home into the body, to compress the spring by means of some jig, which I have illustrated diagrammatically in Figure 6 as including an anvil, which I will mark H, and a plunger, which I will mark P.

When the plunger P is moved up toward the anvil H, the plunger P engages the enlarged head portion of the cap or plunger F, and presses all of the cap or plunger and the spring into a compressed position within the body.

At that point the mechanism must have something applied to keep the plunger F from being driven back off of the inner ends of the pin, and in the type of clamp shown in Exhibit C, that is accomplished by performing the operation of spreading the inner ends of the pins as by means of a screw-driver, and then inserting the strip of metal G between the spread ends, and then finally that strip of metal is driven in until it is flush with the inner ends of the pins, at which time the jig may be released, and the entire assembly is held together as I have indicated in the last figure of this sketch, which I will mark Figure 10.

(Testimony of Harold W. Mattingly.)

Q. Now, do you have a drawing of Exhibit 11?

A. Yes, I have a drawing which is marked Exhibit 17, which I had prepared after observing and disassembling—I beg your pardon—after observing and studying the [64] construction of Exhibit 11 and 11-A, which is the cutaway model, in which the body has been sliced or ground away, so that you can see the interior mechanism.

Q. Now, will you explain that structure?

A. The structure——

The Court: Exhibit 11 is the clamp manufactured by the defendant, and is referred to in the stipulation. That is correct, is it not?

Mr. Mason: Yes, your Honor.

Mr. F. W. Lyon: Yes, that is the defendant's clamp.

Mr. Mason: That is one of the clamps charged to infringe.

The Court: All right.

The Witness: In the drawing, Exhibit 17, I have shown the clamp as comprising a body 5, which is a hollow tubular member. In this instance it is open at both the inner end and the outer end.

Mr. F. W. Lyon: Would you please mark—you have a red pencil there—which end you call the inner end and which the outer end?

The Witness: The outer end is the body I will mark in red with the legend “outer,” and the inner end of the body I will mark with the legend “inner,” and throughout the testimony I will try to keep those designations uniform.

(Testimony of Harold W. Mattingly.)

By the outer end I mean the end of the body which will be projected toward the surface of the sheets through which [65] the clamps are to be placed, and the inner end of the body will be at the end which is at that time toward the operator of the gun or the person who is inserting the clamp in place.

Then at body 1 there is located a retaining member assembly, which comprises a pair of retaining pins, indicated at 20, which are held together at their inner ends by means of a washer, which I will designate as W. The outer ends of the pins project through the body and beyond the end of the body, and have enlarged heads on them, which ends are held apart or spread by means of a T-shaped spreader 25. The cross arms of the spreader 25 extend across the body and are held in place between a pair of washers, which I will mark as Wa and Wb. The spreader is also held in place on the body by means of a cap, indicated at 11, which is a cup-shade cap, having a central opening through which the pins of the—through which the enlarged ends of the pins and the spreader project. The edges of the cup-shaped cap are crimped or pressed into a groove which extends about the surface of the body 5. To engage and operate the pin assembly to project the pins outwardly beyond the spreader 25, there is a plunger 17, or you can call it a plunger or a thimble 17, which is located within the inner end of the body and bears against the assembly pins and washer W. The operating tool

(Testimony of Harold W. Mattingly.)

or gun engages the plunger 17 and forces the pins outwardly against the force of a spring 32, and when the gun is released, the spring 32 retracts the [66] pins 20, to engage the pins between the enlarged heads of the pins and the outer surface of the cap 11.

Q. Now, does the end cap 11 in Exhibit 17 provide the same advantages in assembly as the end cap which you have described in Exhibit 16?

A. Yes. It allows the assembly to be put together with greater ease than if no cap was used, and, in fact, without a cap this particular structure illustrated in Exhibit 17 could not be assembled.

One thing that I failed to mention in my description of this type of clamp was that the plunger 17 has a radially flange 16 formed on it, while the bore of the body has a reduced diameter portion, which I will refer to as 33. So that the assembly in this case must be that the plunger 17 must be placed in from the outer end of the body prior to the insertion of the assembled spring, pins, and spreader, and cap.

Mr. F. W. Lyon: If your Honor please, I object to the last question and move that the answer be stricken. I would like to ask the witness just one question on voir dire.

The Court: Ask the question.

Mr. F. W. Lyon: Have you ever seen a clamp such as Exhibit 11, I believe it is, assembled?

(Testimony of Harold W. Mattingly.)

The Witness: I have not watched the operation of any assembly of a clamp like Exhibit 11.

Mr. F. W. Lyon: Then I move that his answer be stricken, [67] that it has an advantage over the method of the patent, in that he has never seen and at present he has no way of knowing how that device is assembled, other than by what he figures.

The Court: I think, counsel, that goes to the weight of his testimony, the fact that he hasn't seen it. As to the construction of a device that is not a complicated one, I do not believe it would take an expert to say how it was assembled. He could look at it and say. So it goes to the weight of his testimony.

Mr. F. W. Lyon: Well, he is mentioning something he has seen as against something he has never seen. He stated he saw Exhibit 5 assembled and knows how much time it took. He testifies that he saw Exhibit C assembled and knows how much time, but he does not know the time it took to fabricate Exhibit 11.

Mr. Mason: I didn't ask him how long it took.

The Court: Well, it goes to the weight, counsel. All right; proceed.

Q. (By Mr. Mason): Do you have a drawing of Exhibit 12?

A. I do. That is marked Exhibit 18.

Q. Will you explain that?

The Court: Now, this is alleged to be infringed, also?

(Testimony of Harold W. Mattingly.)

Mr. Mason: That infringes patent '787, your Honor, but not patent '408.

A. The clamp, Exhibit 12, I have illustrated by the drawing, Exhibit 18, as comprising a body pin which is initially formed as being open at both the inner end and its outer end. The body has a pin, retaining pin assembly, which comprises a pair of pins indicated by the number 19 which are held together at their inner ends by means of a washer, which I will mark W. The outer ends of the pins are formed with enlarged heads which project through a pair of washers Wa and Wb, and through an end cap 27. Between the washers Wa and Wb there is located a spreader 25, the cross-bar of which is located between the two washers, while the long leg of the spreader projects longitudinally through the opening in the cup-shaped cap 27, to be located between the enlarged ends of the pins.

The operation of the pins, that is the projection of the pins outwardly of the body, is performed by means of a [69] gun or operating tool which will engage a plunger, which I will mark 50, that bears against the assembled washer and the inner ends of the pins W; and when that plunger 50 is pressed inwardly of the body it will project the enlarged ends of the pins to their projected position, and when the gun is released, a spring, which I will mark S, will retract the assembly to clamp the work pieces between the enlarged heads of the pins and the outer surface of the cap—the cap is 27. The

(Testimony of Harold W. Mattingly.)

bore through the body has a smaller diameter portion at the inner end of the body so as to prevent the plunger 50 from passing out of the inner end of the body under the influence of the spring S.

Q. Have you read claim 11 of patent '787?

The Court: What is that question?

(Question read by the reporter.)

The Court: That is a new subject, gentlemen. It is a quarter to five. Take a recess until 10:00 o'clock tomorrow morning.

(Whereupon a recess was taken until 10:00 o'clock a.m. of the following day, Thursday, January 23, 1947.)

Los Angeles, California, Thursday, January 23,
1947, 10:00 A.M.

Mr. Mason: Will you resume the stand, Mr. Mattingly?

HAROLD W. MATTINGLY

recalled.

Direct Examination
(Resumed)

By Mr. Mason:

Q. Mr. Mattingly, will you refer to claim 11 of patent '787 and to the Plaintiff's Exhibits 10 and 11, as well as to the drawings, Exhibits 17 and 18, and

(Testimony of Harold W. Mattingly.)

state whether or not you find embodied in Exhibits 10 and 11 the subject matter described in claim 11?

A. I have here some copies of claim 11 from patent '787 which I prepared in the form of a break-down of the claim into the various elements covered by the claim, and it may be helpful to follow the various elements by referring to those sheets.

Claim 11 of the patent '787 defines:

“A clamp for holding perforated sheet together in superposed relation,”——

which is the type of clamp we have been discussing here, both as shown in the patent and as manufactured by the defendant and illustrated in Exhibits 11 and 12 and the drawings 17 and 18. [72]

The first element of that claim is

“a cylindrical body.”

That is identified in the patent in suit by the reference character 10 and on Exhibit 16, the drawing, shows the cylindrical body by the reference character 10. In the defendant's clamp, Exhibit 11, and on the drawing, Exhibit 17, the cylindrical body, which is the outer sleeve, is referred to by the reference character 5.

In the defendant's clamp, Exhibit 12, and on the drawing, Exhibit 18, the cylindrical body is referred to by the reference character 10.

The next element of the claim is

“a laterally flexible retaining member reci-

(Testimony of Harold W. Mattingly.)

procally mounted in the body for protraction and retraction through the outer end of the body,"——

In the patent '787 the laterally flexible retaining member is the retaining pin assembly referred to by the reference character 19, which includes a pair of pins which are laterally flexible toward and away from each other when they have been projected beyond the end of the spreader. They must be laterally flexible in order that the enlarged heads on those pins can be drawn together sufficiently to permit them to pass through the holes in the work sheets.

In defendant's clamp, Exhibit 11, and as shown on the drawing, Exhibit 17, the laterally flexible retaining member [73] is referred to by the reference character 20 and comprises the pair of pins with the enlarged heads, which, when they are projected forwardly beyond the end of spreader 25, can be flexed toward each other for the same purpose of permitting the enlarged heads to be inserted through the work sheets.

The next element—I should go on. In Exhibit 12 the laterally flexible retaining member is referred to by the number 19, and again comprises a pair of pins which can flex toward each other to bring their enlarged heads into a narrower space for insertion through the work sheets.

The next element of the claim is:

“a spreader bar having lateral sliding engagement with the retaining member,”——

(Testimony of Harold W. Mattingly.)

In the patent the spreader bar is a T-shaped piece of metal indicated at 25, and that is shown on drawing 16, Exhibit 16, as T-shaped spreader 25. In the defendant's clamp, Exhibit 11, and on drawing, Exhibit 17, the spreader is a T-shaped spreader indicated by the reference character 25; and in Exhibit 12 and Exhibit 18, the spreader is also referred to by the reference character 25 and comprises a T-shaped piece of metal disposed between the two retaining pins. [74]

The spreader in each instance is held stationary with respect to the body while the pins are slidable into and out of the body, and hence the spreader is slidable with reference to the pins.

The third element, the spreader, in the Claim 11 of Patent '787 is further defined by the language "said spreader having an angularly disposed inner end portion," and that refers to the cross bar or the top of the "T," which has projecting portions extending laterally on each side of the spreader for the purpose of retaining the spreader within the assembly.

That, as I pointed out, the spreader in the defendant's clamps, both Exhibit 11 and Exhibit 12, is a T-shaped spreader and has the angularly disposed inner end portion.

The next element of the claim is "means for holding the spreader bar against outward longitudinal movement relative to the body." The means that is shown in Patent '787 and on Exhibit 16 is the cap which is referred to by the reference character 27.

(Testimony of Harold W. Mattingly.)

In Exhibit 11, and particularly on the drawing Exhibit 17, the cap is referred to by the reference character 11, and consists of the outer cup-shaped cap.

In the defendant's clamp, which is Exhibit 12, and in the drawing Exhibit 18, this means for holding the spreader is the cap referred to by the reference character 27.

The definition of that element continues "the last-named [75] means consisting of a cover cap having a cylindrical skirt secured to the outer end portion of the body periphery."

The cap in each instance, as I pointed out, is a cup-shaped cap. The cylindrical skirt portion of the cap is secured to the exterior of the outer end of the body member.

The Court: And also side, isn't it? The end and side?

The Witness: The cap covers the ends, with the cylindrical portions of the cap extending about and secured to the outer end portion of the body.

The definition of that means or cap continues in the claim as "an end wall whose inner surface provides an abutment for the angular portion of the spreader bar and whose outer surface provides a sheet-engaging portion."

In the patent the cap, when it is placed on the body, engages these extending ears or projections on the spreader bar and prevents the spreader bar from being forced outwardly away from the body, while the outer surface of the cap provides a smooth

(Testimony of Harold W. Mattingly.)

surface for engaging the surface of the sheets when the clamp is in place in the work sheets.

In the defendant's clamp, Exhibit 11, and as shown in Exhibit 17, the spreader bar with its projections is held from outward movement relative to the body by reason of the fact that the cover cap 11 provides an abutment against which the lateral projections on the spreader bar may engage and be held in place. [76]

The same is true of defendant's clamp, Exhibit 12, and as shown on Exhibit 18, the cap provides an abutment for engaging the lateral projections on the spreader bar and prevents the disassembly of the spreader bar from the remaining structure, and in each instance, both in Exhibit 11 and Exhibit 12, the outer surface of the cap provides a work-engaging surface for engaging the work sheets.

Q. (By Mr. Mason): Now, have you finished?

A. Yes.

Q. Now, will you take Exhibits 11-A and 12-A, which are the cut-open models and point out to the court the cap structure and spreader assembly that you have referred to.

A. In Exhibit 12-A the cap structure is the cylindrical or cup-shaped cap which goes about the outer end of the body and has been crimped or secured into the little annular groove that is formed near the outer end of the body. The spreader is the small piece of metal, which I believe here is T-shaped and has the lateral projections which can be seen between the two washers at the outer end

(Testimony of Harold W. Mattingly.)

of the body, and the lateral projections are prevented from passing out of the end of the assembly by means of the cap.

There is a washer, which I have indicated on Exhibit 17 as a washer Wb. That is an extra piece of metal which is inserted just behind the inner surface of the cap, and I believe its function is to permit a thinner piece of metal to be used [77] for the structure of the cap.

In Exhibit 11-A we find the same assembly, in which the cup-shaped cap is secured to the outer end of the body and provides an abutment for the extending cross pieces of the spreader bar and prevents the spreader bar from moving outwardly; and in both of those exhibits, 11-A and 11-B, the outer surface of the cap is, of course, the surface which engages the work surface when the clamps are in place in the sheets.

Q. You are referring to Exhibits 11-A and 12-A? A. 11-A and 12-A.

Mr. F. W. Lyon: I would like to offer a stipulation, if I might, as to these two clamps, so far as this first patent is concerned. We will stipulate that both Exhibit 11 and Exhibit 12 are identical and that any testimony referring to Exhibit 11 can be applied directly to Exhibit 12, because the only difference is in this element 17 up here at the top. One has one extending out and the other stays all the way in, and that has nothing to do, I believe they will agree, with the first patent.

Mr. Mason: I will so stipulate.

(Testimony of Harold W. Mattingly.)

Mr. F. W. Lyon: So we will not have to repeat the testimony as to each model.

The Court: It will be so understood.

Mr. F. W. Lyon: If Exhibit 11 infringes, why, Exhibit 12 [78] does.

Q. (By Mr. Mason): Did you complete your answer? A. Yes.

Q. Now, will you refer to Patent '408, and also using your charts, as well as the clamp devices, as you may desire, describe and explain the structure of that patent.

A. Patent '408, which I believe is Plaintiffs' Exhibit 2, discloses a clamp of the type we have been discussing here.

The Court: Now, which one are you referring to?

The Witness: Exhibit 2 is Patent No. '408, and I have an enlarged view of one of the figures from that patent, which I had prepared and is identified as Plaintiffs' Exhibit 19.

In Patent '408, and as shown in Exhibit 19, the clamp in this case consists of a tubular or cylindrical body member, which is identified by the reference character 5. The retaining pins identified as 20 comprise a pair of pins which are held together at their inner ends by means of a sort of washer or cover, which connects the two pins together. The two pins extend through an opening in a closure or a washer at the outer end of the body, and also project through a cap member 11, which is secured to the outer end of the body. Between

(Testimony of Harold W. Mattingly.)

the washer and the cap 11 there is disposed a T-shaped spreader 25, which performs the same function of spreading the enlarged headed ends of the pins as the pins are drawn inwardly of the body to engage the work sheets. [79]

A spring 32 is employed to normally urge the pins inwardly of the body and to hold the pins retracted, and the pins are protracted or extended from the body by means of an operating tool or gun, which will engage a thimble 17, which extends about and engages the inner ends of the pin assembly.

The thimble 17 is provided with a radially extending flange, which is designated by the reference character 16, and in the patent the description of the construction of the body 5 is that at its inner end there is a radially inwardly extending shoulder or flange which is designated by the reference character 33. The patent describes this structure as one which is particularly useful in the assembly of the clamps, in that once the assembly has been completed the breaking of the pins or the wearing off of the enlarged heads of the pins, which would otherwise let the spring and pin structure be completely drawn into the body and projected out of the inner end of the body, is prevented by use of the thimble and the flange 33, which in this instance encloses the spring and the pin assembly, so that even though the pins should break they can't escape from the body and can't cause any in-

(Testimony of Harold W. Mattingly.)

jury to workmen or people who have to be using these. [80]

Q. In that case you have a double lock, is that true?

A. That is true. The first lock would be the cap 11, which, as long as the enlarged heads are in the pins and the spreader disposed between them, prevents the passage of the enlarged heads or the ends of the pins back into the device. The second lock or the safety lock is the interengagement of the shoulders or flanges 16 and 33, which, even though something should happen to these pins and they became entirely broken off, the spring and pin assembly will still be retained together and cannot fly apart.

Q. You have mentioned that the retaining pins 20 are protracted from the body by means of a tool engaging the element 17. Do you mean a tool of the character of Exhibit 15? A. Yes.

Q. Now, will you refer to Exhibit 11 and Exhibit 17 and state whether or not you find in those exhibits a structure defined in claims 1 and 2 of patent '408?

A. I have here some sheets that I prepared, comprising a break-down of claims 1 and 2 of patent '408, which will help to follow the testimony.

Claim 1 of patent '408 describes:

"A sheet metal clamp, comprising, in combination," the following elements:

The devices that we are discussing here are

(Testimony of Harold W. Mattingly.)

known [81] generally as sheet metal clamps. The first element of claim 1 is:

“a cylindric body,”——

identified in the patent '408 by the reference character 5. In defendant's clamp, Exhibit 11, and the drawing, Exhibit 17, the cylindrical body is identified by the reference character 5.

The second element of the claim is:

“an end cap secured on the body in position closing the outer end thereof”——

In patent '408 that is the end cap 11 which is inserted into and closes the outer end of the cylindrical body. The patent describes the fact that this cap is inserted and then the material of the cylindrical body is swedged or peened over to hold the cap in place. In the defendant's clamp, Exhibit 11, and in the drawing——

The Court: Let me interrupt you. I think we can push that easel back a little so that all parties can see it more clearly. It will not interfere with the court's vision. I do not mean back that way. I mean over a little more yet. Can you see that better?

Mr. F. W. Lyon: Yes.

A. In defendant's Exhibit 11—I mean in the defendant's clamp, Exhibit 11, and in the drawing, Exhibit 17, the end cap is identified by the reference character 11 and comprises [82] that cup-shaped cap which has its skirt secured to the outer end of the cylindrical body; and the cap 11 acts

(Testimony of Harold W. Mattingly.)

as a device for closing the otherwise open outer end of the body. The same is true in defendant's clamp, Exhibit 12, and in the drawing, Exhibit 18.

Mr. F. W. Lyon: Please eliminate Exhibit 12, as counsel stipulated that does not infringe this patent.

The Witness: Oh, I beg your pardon.

Mr. Mason: We are only contending that Exhibit 11 infringes patent '408, your Honor.

A. The definition of the second element, namely, the end cap, in claim 1 of patent '408 continues:

“said cap presenting an opening there-through,”——

The opening in the patent is designated by the reference character 12, which is the central opening through which the pins and the spreader project. In the defendant's clamp, Exhibit 11, the central opening is the center hole through which the pins and spreader project, and I have indicated that on Exhibit 17 by the reference character 12.

The definition of that cap continues:

“a dished inner portion, and an outer work-engaging portion,”——

In the patent the dished inner portion is the depression on the inside of the cap 11, and the outer work-engaging——

Mr. F. W. Lyon: Would you give that portion, the part [83] that you just referred to, a number, Mr. Mattingly, so we will have a reference to it?

(Testimony of Harold W. Mattingly.)

A. I will mark that with the red pencil as 51. That is the inner surface of that end cap and, of course, the outer work-engaging portion is the outer surface of the end cap 11. In Exhibit 11 and on Exhibit 17 the end cap 11 is, as I have described, a cup-shaped cap which has its inner surface substantially a dished shape, while its outer surface forms the work-engaging portion. The dished shape which is required by those caps is for the purpose of providing a space for the accommodation of the cross-bar of the spreader, and in the patent '408 the end cover has to have some space between it and the backing washer, and in the case of the patent the dished shape is provided there so that the cap can be inserted within the body and secured to it; whereas, in the defendant's clamp, Exhibit 11, the cap is applied to the exterior of the body and its dished shape is for the purpose of providing sufficient material to secure the cap to the body and to provide a space for the reception for the cross-bar of the spreader.

Mr. F. W. Lyon: Just a minute. Mr. Reporter, he referred to a washer in there that I do not believe has any number. Would you read that question and that answer, just at the tail end, and have him put a reference number on that washer? [84]

(Record read by the reporter as requested.)

Mr. F. W. Lyon: What number did you give that backing washer?

A. I gave the backing washer the number "9".

(Testimony of Harold W. Mattingly.)

That is the number which is used to identify that washer in the patent '408; and I have marked Exhibit 19 with the reference character 9; I also mark Exhibit 17 with the reference character 9 to extend to the corresponding washer which I have previously identified as Wa.

The next element of claim 1 is:

“a plunger reciprocally mounted in the body, said plunger presenting a pair of work-engaging pins protractable and retractable through said opening,”——

In the patent '408 the washer reciprocally mounted in the body is the assembly of the two pins 20 with their inner ends secured together by means of the washer at the inner ends of the pins; and they are reciprocable with reference to the body under the influence of the operating tool such as Exhibit 15, and are retractable into the body under the influence of the spring 32.

In defendant's Exhibit 11 and as shown on Exhibit 17 the plunger comprises the assembly of the two pins which I have indicated at 20, held together by means of the washer W at their inner ends and projectable through the opening 12 in the cap, the assembly being projectable or protractable [85] by the operating tool such as Exhibit 15, and the assembly being retractable under the influence of the spring 32.

The next element of the claim is:

“spreader means for separating the pins, in-

(Testimony of Harold W. Mattingly.)

cluding a T-shaped bar having its cross arm disposed in the dished portion of the cap and having its center arm projecting outwardly from the cap through said opening and between the pins to a point spaced outwardly from the outer surface of the cap,"——

In patent '408 that is the spreader bar 25, which has its cross arms located within and engagable by the inner surface of the cap, while the center arm, which is identified as 25a, projects through the opening 12 of the cap between the two pins and extends outwardly beyond the outer surface of the cap. In Exhibit 11 and as shown on Exhibit 17 the spreader is the T-shaped spreader having its cross arm disposed within the dish of the cap and engaging the cap to prevent its being displaced, while the center arm, indicated at 25a, projects through the opening 12 in the cap and extends beyond the surface of the cap.

The next element of the claim is:

“an inwardly disposed flange on the inner surface of the body adjacent to its inner end,”——

In the patent '408 that inwardly disposed flange on the inner surface of the body is the flange 33, which is [86] a narrow flange extending inwardly into the bore of the body. In defendant's clamp, Exhibit 11, and in Exhibit 17 the flange at the inner end of the body is indicated at 33 and comprises a shallow flange which projects inwardly of the bore of the body.

(Testimony of Harold W. Mattingly.)

The next element of the claim is:

“a coil spring in the body around and re-tractively engaging the plunger,”——

In the patent that spring is the spring 32 which surrounds the pins 20 and engages the inner ends of the pins and their assembly washer to normally retract the pins into the body. In Exhibit 11 and Exhibit 17 the spring 32 surrounds the pins and engages the inner ends of the pins and their assembly washer to permit the function of retracting the pins into the body.

The next element of the claim is:

“tool operated means for protracting the plunger against the pressure of said spring, comprising a plunger-engaging member reciprocally mounted in and projecting from the inner end of the body for manual engagement,”——

In the patent that is described as a thimble 17, which engages the inner ends of the pins and which projects outwardly from the inner end of the body, to be engaged by the operating tool such as Exhibit 15.

The definition of that last element continues:

“said member having a relatively increased diameter inner and portion engagable against said flange when the plunger is in fully retracted position.”

In the patent '408 the thimble is formed with

(Testimony of Harold W. Mattingly.)

the radially extending flange 16 which extend out sufficiently far to be engaged by the flange 33 when the thimble is in its extreme retracted position. In the defendant's clamp, Exhibit 11, the thimble 17 is provided with a radial flange 16 which engages the flange 33 when the thimble is in its fully retracted position, and the thimble 17 in this instance extends out of the body 5 to be engaged by the operating tool such as Exhibit 15.

Claim 2 of the patent '408 recites?

“A sheet metal clamp, comprising, in combination, a cylindric body”——

Designated by the reference character 5 and which I have identified as 5 both on Exhibit 19 and on Exhibit 17 which is the illustration of defendant's clamp Exhibit 11.

The next element:

“and end cap mounted on the body in position closing the outer end thereof”——

This is the 11 shown in patent '408, which I have compared with the 11 on Exhibit 17.

The definition of that element continues:

“said cap presenting an opening there-through and a [88] work-engaging outer surface,”——

That is the opening 12 through which the pins and spreader project, and that is found in Exhibit 11 and Exhibit 17 as the central opening 12 through the cap 11.

(Testimony of Harold W. Mattingly.)

The next element of the claim:

“a plunger reciprocally mounted in the body, said plunger having a work-engaging member protractable and retractable through said opening,”——

That is the assembly I have identified as the pin assembly 20, with its washer W, should on Exhibit 17.

The next is:

“a spreader member having a laterally projecting inner end portion disposed in the cap and an outer end portion projecting outwardly through said opening in engagement with the work-engaging member,”——

That is the spreader 25, the cross-bar of which is disposed within the cap 11, as shown in Exhibit 17, and whose outer end portion 25a projects out through the opening and is engaged on each side by the ends of the pin members 20.

The next element of the claim is:

“an inwardly disposed flange on the inner surface of the body at its inner end,”——

and that is the flange 33 which is formed on the body at its inner end and projects inwardly of the bore in the body.

The next element is: [89]

“a coil spring in the body around and retractionally engaging the plunger,”——

(Testimony of Harold W. Mattingly.)

that is the coil spring which I have identified on Exhibit 17 as the spring 32.

The next element is:

“tool-operated means for protracting the plunger against the pressure of said spring comprising a plunger-engaging member reciprocally mounted in and projecting from the inner end of the body for manual engagement, said member having relatively increased diameter inner end portion engagable against said flange when the plunger is in fully retracted position.”

And that is the thimble 17 which is adapted to engage and operate the pins when the device is operated by means of the tool such as Exhibit 15; and it has a radially extending flange 16 or enlarged diameter 16 to engage the flange 33 when that plunger is in its fully retracted position.

I believe that I in my testimony reversed the reference characters 16 and 33. The patent describes the flange on the body which extends inwardly of the body as “a flange 16.”

Mr. F. W. Lyon: I would not do that, Mr. Mattingly, on that one. You are on the exhibit of our drawing and you have, away back in the other, referred to that in the other case.

The Witness: Well, wherever I have referred to the [90] flange which extends inwardly of the body, that should be identified as “16” and the

(Testimony of Harold W. Mattingly.)

enlarged diameter on the thimble should be referred to as "33."

Q. (By Mr. Mason): Have you examined the clamps of the plaintiffs, Exhibits 5, 6, and 7?

A. I have.

Q. Have you examined those in disassembled form? A. I have.

Q. And do you find that those clamps, Exhibits 5, 6, and 7, embody the structure which you have discussed as being shown by claim 11 of the patent '787? A. Yes.

Q. And have you found that the clamp, Exhibit 6, embodies the structure of claims 2 and 3 of patent '408? A. Yes.

Mr. Mason: You may take the witness, Mr. Lyon.

The Court: We will take our morning recess. It is five minutes to eleven.

(Short recess.) [91]

Mr. F. W. Lyon: Before we proceed, your Honor, I think we have a stipulation to make, that Plaintiffs' Exhibit No. 7 does not embody the features of the second patent, the '408 patent, the patented features.

Mr. Mason: That is correct. It does not come within the terms of Claims 1 and 2, your Honor. However, it does embody the invention of '787.

Mr. F. W. Lyon: I mean, there is no claim this was within the features of the second patent?

Mr. Mason: No.

(Testimony of Harold W. Mattingly.)

The Court: It does not come within Claims 1 and 2 in which patent?

Mr. F. W. Lyon: '408, sir.

The Court: All right.

Cross-Examination

By Mr. F. W. Lyon:

Q. What is the function of the cover cap 27 in the Wallace patent '787?

A. The function of the cover cap in Patent '787, Exhibit 1, is twofold. First, it allows the assembly of the spreader between the pins after the pins have been assembled together to form the plunger unit, and the cap holds the spreader onto the body so as not to permit its displacement as the plunger or pins are pressed in and out. Its second function is to provide a smooth work-engaging surface on the [92] outer end of the body, to engage the work sheets without scratching or marring them.

Q. In your last answer are you referring to this cup-shaped portion shown on Exhibit 16, and referred to as No. 27? A. That is correct.

Q. Now, does that cup-shaped device coact in any way with the spring that actuates these devices? I believe it is numbered in this drawing—it is not numbered in this drawing, but I will just write "spring" 'on it in Exhibit 16.

A. Will you read the question to me, please?

(The last question was read by the reporter.)

A. Yes, it coacts with the spring to the extent

(Testimony of Harold W. Mattingly.)

that the entire assembly coacts with the spring, and the opening in the cap through which the pins project forms an abutment to prevent the spring from pulling the pins too far inwardly.

Q. The spring does not engage the cup-shaped member 27 or any loose member attached to that cup-shaped member 27?

A. No, in Patent '787 the spring engages the solid end wall at the outer end of the body.

Q. What is the number given in the patent to that solid end wall?

A. That is an integral end wall 12.

Q. I will add that number at this point, as indicating the solid end wall——

A. That is correct. [93]

Q. ——in Exhibit 16.

A. That would be 12.

Q. What is the function of that end wall 12?

A. It acts as an abutment for the spring and provides a rigid end wall to the body, and in the specific construction shown in that patent that end wall also provides material into which a slot may be cut for the purpose of receiving the cross bar or T-shaped spreader.

Q. You have testified, I believe, an advantage of the structure of Patent '787 over prior devices was that it was a cheaper device to assemble, did you not?

A. No, I compared the structure using the end cap 27 with structures which used only the solid integral end wall and which required the spreader

(Testimony of Harold W. Mattingly.)

to be inserted from the open inner end of the body, and in that connection I stated that the structures using this extra end cap 27 were easier to assemble.

Q. In other words, this structure is easier to assemble and cheaper, in your opinion, than one having only a solid end wall and no end cup?

A. That is correct.

Q. Would you explain how you arrived at such an opinion?

A. I can explain that best by referring to my drawings, Exhibits 20 and 22. In Exhibit 22 we are shown a structure there in which the body C has an integral end wall, with the [94] opening through which the pins are to project. In assembling that, since there is to be no cover cap, the spreader D must be inserted through the open rear end of the cap.

Q. Now, just a minute. Is that not true of the function of the device in '787, the pins have to come through from the solid end?

A. The pins have to come through from the open end, but the spreader does not have to come through from the open end. The spreader is applied after the pins have been projected through the opening in the end wall.

Q. Then the main difference between the two devices is the fact that with a solid end wall and no cap you must insert the spreader from the inside, while on the device with a solid end wall and a cap on it you may insert the spreader from the outside?

(Testimony of Harold W. Mattingly.)

A. I don't know whether that would be the main difference between them, but that is one difference which, in my opinion, makes a quicker and easier assembly.

Q. Are there any other differences?

A. Well, there are other differences, such as the fact that the end wall where a cap is to be used can be slotted, if it is desired, to hold the T-shaped spreader from rotating relative to the body.

Q. You could put a slot on the inside of the body, could you not, on a solid end? [95]

A. Oh, yes.

Q. So that there is no difference there?

A. The only difference would be in the assembly.

Q. Are there any other differences in the two devices, in the manner of assembly?

A. The devices with the end cap and without the end cap?

Q. Yes, that is all we are referring to.

A. Offhand I can't think of any important differences. As I pointed out, the chief difference appears to be the manner in which you can assemble that spreader with the pins.

Mr. F. W. Lyon: I wish to offer next in evidence as Defendant's next in order——

The Clerk: Exhibit D.

Mr. F. W. Lyon: Exhibit D, a set of parts in a sack, which it is stipulated constitute the parts of the defendant's device exemplified by Exhibit 11, and of which Exhibit 19 is a drawing.

Mr. Mason: I will so stipulate that they are,

(Testimony of Harold W. Mattingly.)

your Honor. From my inspection of them they appear to be, subject to any corrections I might find by a more careful examination.

The Clerk: Admitted, your Honor?

The Court: Yes. Which drawing, now, does that refer to?

Mr. F. W. Lyon: These are the parts that make up Exhibit 17 or the finished Exhibit 11. [96]

The Clerk: Defendant's Exhibit D.

Q. (By Mr. F. W. Lyon): Mr. Mattingly, I will hand you Defendant's Exhibit D, and ask you if that clamp can be assembled in any way you know, in which the spreader is pushed on the outside, slipped in from the outside, such as the manner in which the spreader 25 is slipped into Exhibit 16?

A. Why, yes, it can be assembled by inserting the spreader from the outside of the body.

Mr. F. W. Lyon: I offer in evidence next in number, I believe it is E, a sub-assembly from defendant's clamp, exemplified by Exhibits 11 and 17. I believe it is stipulated that this is such a sub-assembly?

Mr. Mason: I will stipulate that it appears to be.

The Clerk: Admitted, your Honor?

The Court: Yes.

The Clerk: Defendant's Exhibit E in evidence.

Q. (By Mr. F. W. Lyon): I will show you a sub-assembly, Exhibit E, and ask you what the difference is between that sub-assembly and Exhibit C.

(Testimony of Harold W. Mattingly.)

A. Exhibit E, as you pointed out, is a sub-assembly. Exhibit C is the complete assembly of a clamp with the pins, spreader, and all of the parts secured in place within the body. The primary difference between these two is that in Exhibit E this sub-assembly can be put together as a unit for insertion later into a body, whereas in Exhibit C it would be [97] impossible to make a sub-assembly of the parts and then insert them through the solid end wall of the body in Exhibit C.

Q. Will you compare the structure of these two and tell me what differences there are?

A. The sub-assembly E, as I pointed out, does not have any body, and it does not present the problem of inserting a spreader from within the body to a position between the extending ends of the pins. The sub-assembly, Exhibit E, has the spreader which is insertable through this small cap during the making of the sub-assembly, and then the sub-assembly is inserted in the body and the cap is used to hold the sub-assembly in place on the body. In other words, the sub-assembly that you have shown me here can be applied to a body which has either an open end wall on the body or a closed end wall—no, it can't be inserted on a closed end wall on the body. I beg your pardon.

Q. It could not be used to insert in the body illustrated in Exhibit 16 in Patent '787?

A. No. If you have a sub-assembly like this, it must be inserted into the body from what I have referred to as the outer end of the body, and that

(Testimony of Harold W. Mattingly.)

would require the outer end of the body to have a big hole in it.

Q. There is nothing in Patent '787 that teaches you can insert such a sub-assembly completed and finished into a body?

A. Not in Patent '787, no. [98]

Mr. F. W. Lyon: I have here a clamp that I ask be offered in evidence as Defendant's next in number. The only reason I am offering it is to illustrate the witness' testimony, and it is stipulated that this is an operating clamp.

The Clerk: Admitted, your Honor?

The Court: Yes.

The Clerk: Defendant's Exhibit F in evidence.

Q. (By Mr. F. W. Lyon): Now, I will show you Defendant's Exhibit F, and ask you to compare that with Defendant's Exhibit C.

A. Defendant's Exhibit F appears to be substantially identical with Exhibit C so far as the construction of the body, the pins, the spreader, and the assembly of the spreader and pins through a solid integral end wall on the body. There is some difference in the manner in which the inner ends of the pins are secured together.

Q. Now, will you compare this exhibit——

The Court: There is a difference in the jackets, isn't there?

The Witness: Oh, yes, there is a difference in the shapes of the bodies on these two, but the function and operation of the bodies are the same.

(Testimony of Harold W. Mattingly.)

Q. (By Mr. F. W. Lyon): That shape is not functional? A. No.

Q. It is merely that one device is a larger device than [99] the other?

A. And in the case of Exhibit C the shoulders for engagement with the operating tool are formed as a wide groove, for as in Exhibit F the shoulder is formed merely by a single extending flange.

Q. Now, will you compare Exhibit F with the sub-assembly, Exhibit E?

A. I make the same comparison that I did between the sub-assembly and Exhibit C, namely, that this sub-assembly, Exhibit E, could not be inserted in its assembled condition in the body of Exhibit F.

Q. Isn't it true that the only difference between C, E and F is that there is no flange on the black circular cup-shaped member of Exhibit E to engage a working tool? Otherwise functionally they are exactly the same device?

A. Yes, I think functionally they are the same.

Q. If you put a flange on this cup, an outwardly extending flange on Exhibit E, similar to the flange you referred to on Exhibit F, Exhibit E could be operated as a sheet fastener just as well as Exhibit F?

A. Not just as well. It would be of rather flimsy construction because of the material that is used in this cap, as compared with the heavier material which is used on the body of Exhibit F.

Q. What difference does that make in the operating function? [100]

(Testimony of Harold W. Mattingly.)

The Court: The material in these different clamps and gadgets is not in issue.

Q. (By Mr. F. W. Lyon): There are no functional differences there because you changed the material?

A. No, no. The sub-assembly, Exhibit E, could be used as a temporary clamp without any additional flange on it.

Q. By "temporary" you mean temporary in the sense you referred to with the temporary rivets or temporary fasteners, and not just——

A. As a makeshift?

Q. ——as a makeshift?

A. No, I used the expression "temporary" as I have used it in all of these assemblies we have talked about.

Q. Now, I will show you the parts that comprise Exhibit D, and ask you if you could make that sub-assembly without the same process you described in referring to Exhibit 22. A. Yes.

Q. You have to assemble both of them in the same way, do you not?

A. No, there is one primary difference, and that is that in Exhibit 22 you are attempting to insert the pins and the spreader into a rather long body.

Q. That is just a matter of the size of the body and not of the function of it, though? [101]

A. It is more than a matter of the size of the body when you are attempting to insert a set of pins and a spreader into a very small diameter opening in a fairly long body. Then you have difficulty in

(Testimony of Harold W. Mattingly.)

holding the parts in place while you are inserting them. In your sub-assembly, Exhibit E, the little cap that you have referred to as being like the body of Exhibit F is very shallow, so that all of the parts are open for you to grasp and to manipulate without having the difficulties of trying to manipulate something which is deep down in the hole in the body.

Q. Referring to Patent '787 will you show me where the body is described as being of any particular length, size or dimension, or where that is set forth in the Claim 11?

A. No, it isn't set forth in the claim and there are no dimensions given in the specifications of the patent. The construction which is illustrated in the drawings, however, does show an elongated body.

Q. But you will admit the sub-assembly, Exhibit E, is substantially as much a body as you have shown in Exhibit 22 or Exhibit 16?

A. No, I couldn't call that a body. It doesn't serve the function of a body. It wasn't intended to serve the function of the body of those other exhibits.

Q. The only difference between it and the body is there is no flange on it to grab the tool? [102]

A. And it isn't long in the sense that I have testified to here, which is the usual construction of the bodies on these clamps. [103]

Q. I refer you to Exhibit F, and would you say the same thing about that as your last statement?

The Witness: Well, would you read the preceding question and my answer?

(Testimony of Harold W. Mattingly.)

The Reporter: The other reporter just left the room, Mr. Mattingly, with both of them.

Q. (By Mr. F. W. Lyon): Well, would you state that that did not have an elongated body?

A. No; I would state that Exhibit F does have an elongated body. It has a sufficiently elongated body to present the problem that I have discussed here of making it difficult to get the pieces assembled through the hole in the end of the body, because you have to work in a fairly deep, small, bore of the body.

Q. Wouldn't you have that same difficulty in inserting that spreader from the inside of that cap in sub-assembly, Exhibit E, I believe it is, as you would in the Exhibit in your hand, Exhibit F?

A. No. The shallower your cap or body will be, the easier it will be to assemble those parts.

Q. Then it is merely a matter of degree as to the length of body?

A. Yes; it depends on the particular finished clamp that you are trying to assemble. If it has a long body with a deep hole in it, you have that problem that I have discussed [104] here, and if you have merely the shallow cap, such as is on Exhibit E, your problem is much less intricate.

Q. But, to make the sub-assembly, you still have to insert the spreader and the retaining pins on the inner side; you cannot put them on the outer side as taught in patent '787?

The Witness: I don't believe I understand that question. Would read it to me?

(Question read by the reporter.)

(Testimony of Harold W. Mattingly.)

Mr. F. W. Lyon: Well, I will make that question clearer. Strike it.

Q. You have made a chart here, Exhibit 20, I believe, as to how parts of Exhibit 16 of patent '787 are assembled. If I understand your testimony—and correct me if I am wrong—you put your retaining pins A through the body, the opening in the body C? A. That is correct.

Q. Then you slip the T-shaped spreader D between the ends of the retaining pins as they extend from the body? A. That is right.

Q. Then you slip the cap E over the end of the retaining pins, down over the spreader, and crimp the same in position and release it?

A. That is right, though you can release it prior to crimping. [105]

Q. Now, in a device made from the parts Exhibit D, which are exemplified in Exhibits 11 and 17, can you assemble that device by putting the retaining pins 20 in the body first and passing them through the end of the body?

A. If I understand your question correctly, I don't think that you could. The construction at the inner end of the body there, which includes those inter-engaging flanges on the body and the plunger 17, would make it impossible to assemble that clamp from its inner end.

Q. Principally because you would not have any way of holding it in position in the body; you could not apply the cap, the spreader, to this body because

(Testimony of Harold W. Mattingly.)

you could not hold the retaining pins in the body the way you hold them in in Exhibit 20?

Mr. Mason: Is that a question or a statement?

The Witness: I did not follow that. I am sorry. Would you read that to me?

(Question read by the reporter.)

A. I don't think that that is true. You could hold the pins in the body, that is, they would be in the body during the remaining steps in the assembly.

Q. They would just be loose in there?

A. That is right.

Q. The body would be a nuisance; you would have to make the sub-assembly first? [106]

A. That would be the logical way to do it; yes.

Q. And in making that sub-assembly, you have to assemble the entire device through the body or the cup, just as you have assembled it in Exhibit C, in the same direction?

A. You would have to make your assembly of your pins and spreader from the rearward end of the cup.

Q. And as you do in Exhibit 22 and Exhibit C?

A. The same as you would have to assemble those parts from the rear of the body in Exhibit 22.

Q. Then all that you do when you add the body to the sub-assembly to make the finished clamp is to put a protecting sheathe around it?

A. You could say that; yes. It is a heavy body which is adapted to operate and cooperate with the operating tool.

(Testimony of Harold W. Mattingly.)

Q. But the mode of assembly, other than crimping on the body, is identical with the mode of assembly of Exhibit 22?

A. Except for the fact that you are working with your sub-assembly with only a very shallow cup, and you do not have the difficulties that you would with the elongated body.

Mr. Mason: If your Honor please, I do not like to interrupt Mr. Lyon, but I made a stipulation here that that was a sub-assembly of part of Exhibit 11. Now, this line of cross-examination has been directed to forgetting that it is in a sub-assembly and forgetting the part of the clamp [10] that we are charging to infringe. I do not see the materiality of it. He may have something in mind, or we are wasting time. There may be many ways you could do that.

The Court: I think it was mostly by way of explanation, wasn't it, Mr. Lyon?

Mr. F. W. Lyon: That is right. I contend that we assemble this device the same as we assemble the other one there, and I think the witness has practically stated that.

The Court: Proceed.

Q. (By Mr. F. W. Lyon) Is it not true that the cup on that sub-assembly, Exhibit E, and the finished body which is referred to in Exhibit 17 as No. 5, constitute a two-piece body?

A. Yes; you can call it a two-piece body.

Q. There is no difference in putting those two

(Testimony of Harold W. Mattingly.)

parts together than there is in putting the bottom on an ordinary tin can?

The Witness: Would you read the question to me, please?

(Question read by the reporter.)

A. That is a fairly good statement of it; yes.

Q. Is there any functional difference in the enclosure structure of patent '787 from that in the patent '408, the two patents in suit?

The Witness: Would you read that to me?

The Court: We will recess until 2:00 o'clock.

(Whereupon a recess was taken until 2:00 o'clock p.m. of the same day, Thursday, January 23, 1947.) [109]

Los Angeles, California, Thursday, January 23, 1947
2:00 P.M.

(Case called by the clerk.)

HAROLD W. MATTINGLY

called as a witness by and on behalf of the plaintiffs herein, having been previously duly sworn, resumed the stand and testified further as follows:

Mr. F. W. Lyon: I believe there is a pending question before the witness.

Cross-Examination
(Continued)

(The question referred to was read.)

The Witness: Was that "enclosed?"

(The question referred to was reread.)

The Witness: I am afraid I don't understand your question, Mr. Lyon. The Patent '787 has an end closure comprising the cap 27. Patent '408 has an end closure comprising cap 11, and in the sense that both of those are used to provide a surface to engage the work surface, and they provide an inner surfaces that engages and holds the spreader from disassembly. The answer is the functions are the same.

Q. (By Mr. F. W. Lyon): By the end closure of Patent '787, you only mean the cup-shaped end 27?

A. That is what I have referred to here in my last answer, that that is the end closure. [110]

(Testimony of Harold W. Mattingly.)

Q. Is that what is meant in Patent '787 by the words "end closure"?

Mr. Mason: Are you referring to Claim 11 of the patent, or to the specifications?

Mr. F. W. Lyon: I am referring to the specifications at present.

The Witness: I don't find the words "end closure" in the specifications here of Patent '787, nor in the claim, Mr. Lyon.

Q. (By Mr. F. W. Lyon): All right. You interpreted the words "end closure" in the claim to mean certain parts of it are those parts, in Claim 11?

A. In Claim 11 the expression is "an end wall" rather than "an end closure," and that refers to cap 27 and does not apparently include the other structure there.

Q. Now, Claim 11 refers to "a cover cap" in Line 53. What is meant by that? What interpretation do you place upon those words in the claim?

A. Upon the words "cover cap"?

Q. Yes.

A. The cover cap is the cup-shaped cap 27 shown in the drawing of Patent '787.

Q. Are you familiar with the proceedings leading up to the grant of Patent '787, known as the file wrapper?

A. I have studied the file wrapper, yes. [111]

Q. Is there any interpretation in that file wrapper of the meaning of that language?

A. I don't believe that there is. My recollection

(Testimony of Harold W. Mattingly.)

of the file history or file wrapper is that the language of Claim 11 was inserted, and that claim was allowed without any rejection.

Q. As to that Claim 11, no references were ever cited against it? A. That is correct.

Q. Now, you have referred to a method of assembly of these devices and illustrated it in Exhibit 20. Can a device such as shown in Patent '408, Exhibit 19, be assembled in that manner?

A. In what manner? In the same manner as the assembly in Exhibit 20?

Q. Yes. A. No. In Exhibit—

Q. 19?

A. In Exhibit 19 the assembly in that instance would include what you would call a sub-assembly of the retaining pins. The washer, the spring, the washer 9 and the cap 11, with the spreader would be assembled as a separate unit, and then inserted into the body and thimble after the sub-assembly had been completely put together. [112]

Q. In other words, to assemble patent '408 you would have to go to the type of assembly you have in Exhibit 22? A. No.

Q. You would have to insert the pins and spreader into a cap or body member as all from the same side?

The Witness: Would you give me the previous question, please?

(Previous question read by the reporter.)

A. No.

(Testimony of Harold W. Mattingly.)

Q. Would you not have to insert the pins, the retaining pins, and the spreader through the same side of the cup-shaped body in assembling patent '408 as you would in making the assembly 22?

A. No. You would do just the opposite, that is, to assemble the structure shown in '408 you make your sub-assembly and then you insert——

Q. What I mean is how do you make the sub-assembly? That is what I mean. You have to make the sub-assembly just the way you do 22?

A. To make the sub-assembly you would insert the pins, the enlarged ends of the pins, through the washer 25, first; then you would insert the spreader——

Q. Is not 25 the spreader?

A. I beg your pardon. Washer 9, isn't it?

Q. Yes. [113]

A. You would insert them through the washer 9 and then you would insert the spreader laterally between the two pins, and then you would insert the enlarged heads of the pins through the cap 11. In 22, in Exhibit 22, your first step there is to insert the pins through the body, and then insert the spreader laterally, and then—I beg your pardon—22 is the structure without the cap. Your assembly would be entirely different, as I see it in——

Q. In Exhibit 22 is it possible to assemble the spreader and pins in one operation into the body?

A. Oh, yes. As a matter of fact that is the way it is illustrated there in 22. Your first step in 22, shown in Figure 2 of that drawing, shows how you

(Testimony of Harold W. Mattingly.)

put the spreader in between the two pins, and then while holding in that position you insert the spreader and the pins through the body, as shown in Figure 3 and Figure 4 of that drawing.

Q. According to you, you have to stagger your pins when going through the body?

A. It is preferable; and while it may not be absolutely necessary if the enlarged heads on the pins are not too big, you could probably get them through there where they are in alignment with each other

Q. Isn't your Exhibit 22 your idea? You have never seen a fastener assembled in that manner commercially; you merely figured that that is one way of doing it? [114]

A. That is the way that I saw one of that type of fastener assembled at the Monogram factory. And when you say "commercially", I——

Q. Well, that was one sample. There was no production going on at the time, of those fasteners?

A. No, not of that type of fastener; so I could only see the one assembly operation.

Q. In other words, they had no set-up at the time to commercially produce these fasteners of that type; it was just an experimental model, you might say, at the time you saw it?

A. It was not an experimental model. It was an old model that had been made up for commercial use, and we just took it apart and put it together again by the series of operations that they informed me had been the way they had assembled them.

(Testimony of Harold W. Mattingly.)

Q. Now, in patent '408 what is the function of what you call the washer 9?

A. The function of washer 9 is to act as an abutment for the end, that is, for the outer end of the spring, which is 32, I believe. The end of the spring bears against that washer which in turn acts as an abutment for the upper end or the cross-bar of the T-shaped spreader.

Q. The dish-shaped cup 11, other than locking the completed device in position, has no function in connection with the spring 32? [114-A]

A. It has no function with the spring 32, except to hold all of the parts together to prevent the spring from pushing the whole end out. In other words, that does not in itself act as an abutment for the spring.

Q. Exhibit 11, you have described the manner of assembling it here, in which you had to make a sub-assembly, Exhibit E, in which the spreader and the pins were inserted from the inside of the cup. In your opinion, is that the same operation as assembling over a washer, then inserting your spreader, and then fastening your cap on the end of that?

A. Essentially, yes.

Q. Would it be possible to make the assembly shown in '408 without washer 9?

A. Yes; it would. In fact, you have none of this sub-assembly you have here.

Q. Then the washer 9, in your opinion, has no function?

A. It does have a very definite function. It is

(Testimony of Harold W. Mattingly.)

possible to make an assembly without using that washer 9, but it is not, in my opinion, as satisfactory as if you used the washer 9. In the first place, the ends of the spring, of any helical spring, while they are manufactured purposely to present the end helix on the spring as nearly flat as possible, they are not always flat, and you can't depend upon the same amount of contact on both sides of the extending crosshead of [115] the T unless you use the washer in there and let the spring bear against the washer. I think the assembly which includes the washer is more satisfactory, though it is possible to make it without it.

Mr. F. W. Lyon: I think that is all.

Redirect Examination

By Mr. Mason:

Q. Mr. Mattingly, could you make a sub-assembly such as defendant's Exhibit E and mount in on the body of Exhibit 11 without using the body and cap combination such as is used in Exhibit 11 or the drawing of that exhibit, Exhibit 17?

A. No; you could not. The structure shown in Exhibit 17, as I pointed out, includes the body portion in which the upper end has—the inner end, as we have referred to it here, has the inter-turned flange to engage that thimble; so that it is essential that the assembly of the spring, pin, cap, and spreader be made in that body from the outer end of the body, and you would have to have your body

(Testimony of Harold W. Mattingly.)

capable of allowing all of that assembly to pass inwardly from the bottom end and then your cap to secure that assembly to the body.

Q. Could you use a sub-assembly, Exhibit E, and apply it in Exhibit 10?

A. No. If you formed your sub-assembly, you could not [115-A] get it into Exhibit 10 for the reason that your sub-assembly would have the T-shaped spreader disposed between the enlarged heads of the pins, and you could not then get the enlarged heads of the pins and the spreader through the opening in the solid end wall of the body used on Exhibit 10.

Q. In order to apply Exhibit E to Exhibit 10, it would be necessary to force this entire upper part of the assembly through the hole in the end wall of the body, wouldn't it, and then subsequently erip the cap on the body in some way?

A. Yes.

Q. You have pointed to an end wall 12 in the specific embodiment of the invention illustrated in one of the figures of the drawing of patent '787. Do you find in claim 11 that that end wall, as distinguished from a cap, is made an element of the claim?

A. No; there is no element in the claim corresponding to that end wall.

Q. As to claims 1 and 2 of patent '408, do you find any end wall made an element of the patent claim, in addition to a cap? A. No.

Q. Now, do you find in Exhibit 11 any counter-

(Testimony of Harold W. Mattingly.)

part for the wall which is designated as wall 12 in drawing Exhibit 16?

A. The washer which I have indicated as 9 in Exhibit 17 could be said to perform the same function as the end wall [116] 12 in patent '408, in the sense that it acts as an abutment for the spring on the one side and acts as an abutment for the cross-bar on the T on the other side. [117]

Q. Now, in your cross-examination you made the statement that Exhibits C, E and F are functionally the same. I believe the statement was something to that effect. Now, is Exhibit E a complete and functional clamp?

A. Not in my opinion. It is not a complete clamp. It is a sub-assembly which is intended and designed to be used with additional parts in the making of a complete clamp.

Q. In other words, Exhibit E, as there, is not an operative clamp?

A. No, you would have to do some other things to that sub-assembly in order to make it into an operative clamp.

Q. So that before they would be functionally the same, that is, to the extent that they would both clamp something, you would have to complete Exhibit E? A. That is correct.

Q. By mounting it on a body, such as the body in Exhibit 11? A. That is right.

Q. I believe you also answered the question, which was asked you, if the operation of the placing of the cap on the body was something like placing a

(Testimony of Harold W. Mattingly.)

cover on a can. Are those two operations of the same character?

A. No. Securing the actual crimping of the cap on the end of the hollow body can be likened to putting the end on a can in the sense you crimp one about the other, but the [118] assembly of a body and cap, with the sub-assembly of pins, and so forth, would be considerably different than merely putting an end on a can.

Q. Now in all of these drawings, Exhibits 16, 17, 18 and 19, there is a leg of the spreader 25 which projects outwardly through the end cap and outwardly even beyond the ends of the retaining pins when the pins are fully retracted. What is the purpose of that, if you know?

A. Unless the center leg of the T-shaped spreader extends a considerable distance beyond the end cap and, in fact, it should extend far enough to substantially penetrate all the way through the aligned holes in the sheets of material with which the clamps are to be used, so as to hold the enlarged ends of the spreader in their spread condition, even though they have been spread far enough to go through the sheets of material—if the leg of the spreader does not extend that far, then the only thing that holds the enlarged heads far enough apart to engage the edges of the holes in the sheets is the resilience or elasticity of the pins themselves, and they may spring together or toward each other sufficiently to release the sheets and let the clamp inadvertently fall out.

(Testimony of Harold W. Mattingly.)

Q. In other words, the thickness of the pins above the heads, plus the thickness of the spreader should be substantially the diameter of the hole through the sheets which are being held? [119]

A. That is correct. And that fixed space or diameter should be carried far enough away from the end of the cap to completely or substantially completely fill the longitudinal extent of the holes in the sheet. Otherwise, you are only depending on the spring of the pins to hold your sheets together.

Q. That is all?

A. I should say the resilience of the pins to hold the sheets together.

Mr. Mason: That is all.

Mr. F. W. Lyon: I have just one or two more questions of this witness.

Recross-Examination

By Mr. F. W. Lyon:

Q. Mr. Mattingly, you state the safety type cap, such as Patent '408, could only be assembled through the lower end?

A. As shown in the patent, yes.

Q. You couldn't make the assembly in any other way?

A. Not if you are using the structure shown in the patent. There is a possibility of your making an assembly—you might be able to make an assembly from the other end by not forming the flange 16 at the inner end of the body until after the assembly

(Testimony of Harold W. Mattingly.)

had been made, and then attempt to swedge that inner end of the body inwardly to form the retaining flange. [120]

Q. You could form a safety cap the same way then as you illustrate in Figure 22 by merely crimping over the end, and lock the cap in place after the assembly?

A. Would you read that question to me, please?

(The question was read.)

A. There is no safety cap shown in Exhibit 22, Mr. Lyon, and there is no crimping operation which is performed in Exhibit 22.

Mr. Mason: Were you referring to 17 or 19?

Mr. F. W. Lyon: No.

Q. (By Mr. F. W. Lyon): I hand you a clamp and ask you if you know how that could be assembled. A. It is a little——

Q. It is a safety cap.

A. This clamp appears to have a body formed with an integral end wall so that the assembly of your spring, your retaining pins, and your spreader, that much of it, would probably have to be assembled along the lines I have indicated in Exhibit 22, and after you had completed that assembly, then——

Q. Let us mark the neck of that with a red pencil.

(Counsel did as indicated.)

A. The sleeve, which I have indicated in Exhibit 22 at F, could be assembled on the pins and that

(Testimony of Harold W. Mattingly.)

sleeve could have a radially extending flange such as 33, although from this model [121] I can't tell whether it does or not, and then the extreme outer end, or, the extreme inner end of the body which you have indicated in red could then be swedged over or rolled over to hold the sleeve F in place.

Q. That would be one way of manufacturing a locked-in cap? A. Yes.

Mr. F. W. Lyon: May I offer the clamp just referred to as defendant's next number?

The Court: In evidence.

Mr. Mason: I object to it as being immaterial. There might be many ways in which you could make a clamp. This is encumbering the record.

Mr. F. W. Lyon: It is just to illustrate his testimony.

The Court: It just illustrates Mr. Mattingly's testimony.

The Clerk: It will be Defendant's Exhibit G in evidence.

Q. (By Mr. F. W. Lyon): In Plaintiffs' Exhibit 11 and the chart 17 is the pressure of the spring 32 directly on the end cover 11?

A. In Exhibit 17?

Q. Yes.

A. The force exerted by that spring is directed onto the cover 11, yes.

Q. Is the force of the spring in Exhibit 16 exerted on the end cover cap 27? [122]

A. No.

Q. Now, then, as I understand, you state that

(Testimony of Harold W. Mattingly.)

the crimping of an end on a tin can is functionally different than crimping of a cap 25 on the body of the patent in suit?

A. If I understand what you mean by the word "functionally," I would say yes. It is different in the sense that while the actual crimping of the cap on the body can be likened to the putting of an end on a tin can, there is a difference in the type of connection that is made between them. On a tin can you have your side walls of your can and your cover, and the material has to be spread out and rolled upon itself to form your function between your can, that is, your can cover and your can top and your body. In the constructions we have been talking about here, your cap is formed with an extending skirt, I believe it is referred to in the patent, which goes up around the body and the body is formed with an annular groove and your crimping is formed by merely shoving the crimping into the groove. Your assembly of a sub-assembly such as——

Q. I didn't ask any question about the sub-assembly. I asked you as to the fastening on of the cap.

A. If you mean by "functionally" that the cap is finally secured to the body, the answer is yes.

Mr. F. W. Lyon: I think that is all. [123]

Redirect Examination

By Mr. Mason:

Q. Does it make any difference, Mr. Mattingly, in the functions of this clamp whether the spring

(Testimony of Harold W. Mattingly.)

in the clamp exerts its pressure on an end wall, such as 12 in Exhibit 16, or whether it exerts it on a washer such as Wb in Figure 11 or Figure 12—I mean in Exhibit 11 or 12, or those drawing Exhibits, Exhibits 17 or 18?

A. Will you read the question, please?

(The question was read.)

A. No, the only function to be performed is to provide something against which that end of the spring may bear and push to exert its force, to draw the pins into the body.

Mr. Mason: That is all.

The Court: That is all. Thank you.

(Witness excused.)

Mr. Mason: Now, I was going to recall Mr. Livingston to just ask him one question, but Mr. Lyon says he is willing to stipulate. I want to establish that the price of the old Cleco clamp at the time that Monogram came out with these Wallace clamps was 20 cents or over, each. Do you so stipulate?

Mr. F. W. Lyon: Yes, I will stipulate they were sold for 20 or more cents apiece in 1940.

Mr. Mason: In 1941, the early part of 1941?

Mr. F. W. Lyon: Well, up to April, 1941, I can stipulate.

Mr. Mason: That is all right.

Now, in my stipulation with relation to Exhibit E, I stipulated that was the same as a part of the sub-assembly of Exhibit 11. On more careful in-

spection there seems to be one of the washers, namely, a washer corresponding to Wa in Exhibit 17, that has been omitted from this sub-assembly. Now, Exhibit 11 and Exhibit 17 are the stipulated structures. May it be deemed that there should be another washer in Exhibit E?

Mr. F. W. Lyon: I would just like to ask Mr. Mattingly one question. Then I will.

The Court: All right.

HAROLD W. MATTINGLY

recalled as a witness on behalf of the plaintiff herein, having been previously duly sworn, was examined and testified as follows:

Recross-Examination (Continued)

By Mr. F. W. Lyon:

Q. The answers you have made, Mr. Mattingly, with reference to the sub-assembly E, would they be changed if there was another washer positioned in here above the cross arm of the T?

A. I don't think that the answers to the questions of which you have asked me about the sub-assembly E, or that Mr. [125] Mason has asked me, would be changed, whether there was a washer there or not.

Q. In other words, your evidence is that whether the washer is above or below, or whether there are two washers, there is the same difference?

(Testimony of Harold W. Mattingly.)

A. Yes. The answers I made did not depend upon the presence or absence of a washer in that position.

Mr. F. W. Lyon: That is all.

The Court: That is all.

(Witness excused.)

Mr. Mason: That concludes the plaintiff's direct case, your Honor.

Mr. F. W. Lyon: Now, your Honor, before making an opening statement in this case, I would like to offer in evidence a book of exhibits including the patents in suit and the prior art set up. I have a copy here for your Honor, and I will ask that this book be marked exhibit in number.

The Clerk: That will be Defendant's Exhibit H in evidence.

Mr. Mason: May I ask if those are the patents named in the answer, Mr. Lyon:

Mr. F. W. Lyon: Yes. I am going to offer each one individually, but I am offering the book as a whole, subject to any exceptions you may wish to take.

The Court: What does the book contain, generally? [126]

Mr. F. W. Lyon: It contains the prior art, the two patents in suit, and two prior Wallace patents, which I wish to offer in evidence.

The Court: The prior art, the patents in suit, and two prior Wallace patents?

Mr. F. W. Lyon: Yes. It is a bound book, for your Honor's convenience.

Now, as Exhibit H-1 I will offer the Wallace patent in suit bound in this book, No. 2,365,787.

The Court: Will you give the number again?

Mr. F. W. Lyon: 2,365,787.

The Court: All right.

Mr. F. W. Lyon: As Exhibit H-2, the patent in suit, Wallace No. 2,364,408.

Mr. Mason: May I ask why you are placing in evidence the patents in suit, when they are already in?

Mr. F. W. Lyon: I am just putting this whole book in.

The Court: It is just a matter of convenience, counsel.

Mr. F. W. Lyon: The next one as Exhibit H-3 is the British patent to the A. T. S. Company, Limited, 413,403. [127]

The Court: 413,403, a very small number.

Mr. F. W. Lyon: That is right. It is a British patent, your Honor, of February, 1934.

The Court: February 13?

Mr. F. W. Lyon: February, 1934.

The Court: All right.

Mr. F. W. Lyon: As H-4, the British Patent to Rocroy, 443,683, of July, 1935.

As H-5, United States Letters Patent to Blanc, No. 2,136,875, issued in November, 1938.

As H-6, United States Letters Patent to DeMooy, 2,159,655, issued May, 1939.

As H-7, United States Letters Patent to DeMooy,

2,269,188, issued on January 6, 1942, the application for which was filed on March 15, 1940.

As H-8, Patent to Webb, 2,256,634, issued September 23, 1941. The application for this patent was filed on March 22, 1941.

The Court: That is to Webb?

Mr. F. W. Lyon: To Webb. H-9 is United States Letters Patent to Rogers of March 17, 1942. The application thereon was filed April 18, 1941. That is patent 2,276,344.

As H-10, the patent to Wallace, 2,271,879, issued February 3, 1942, and the application thereon was filed November 4, 1941. [128]

As H-11, patent to Wallace, 2,266,929, issued December 23, 1941, and the application was filed August 23, 1941.

Mr. Mason: May I ask if you are offering H-5, the Blanc patent, merely to show the state of the art and not as anticipatory?

Mr. F. W. Lyon: H-5, the Blanc patent——

The Court: When was the application filed on the patent to Wallace, December 23, 1941?

Mr. F. W. Lyon: ——which patent number is that?

Mr. Mason: That is Blanc.

Mr. F. W. Lyon: That is number what?

Mr. Mason: 2,136,875. I do not believe that is set up in the answer. If you are offering it for any purpose except to show the state of the art, I am objecting to it.

The Court: What number, again, Mr. Mason?

Mr. Mason: That is H-5, patent No. 2,136,875 to Blanc.

The Court: That is right; H-5.

Mr. Mason: I think that is the one that covers the old Cleco patent, if I remember.

Mr. F. W. Lyon: That is set up, your Honor, in the answers to the interrogatories, and the patent is intended to be relied upon.

Mr. Mason: I do not believe it is named in the answer, is it?

Mr. F. W. Lyon: No; it is not named in the answer. [129]

Mr. Mason: I object to that upon the ground of improper notice, if it is offered for anticipatory purposes. The law is, your Honor, that you have to give 30 days' notice.

The Court: Oh, yes.

Mr. F. W. Lyon: That is a matter for argument, your Honor. But, first, they have already referred to it and placed in evidence—the plaintiff has—the direct evidence that this device was on sale and in public use, themselves.

The Court: Yes. From that standpoint it would be satisfactory, but would it be satisfactory notice that you were going to rely upon it for the purposes of this action?

Mr. F. W. Lyon: And, as Exhibit 3-C, they introduced this patent in evidence. So they cannot now assert that they had no knowledge of it.

The Court: They are not asserting that. It is a

question as to whether or not you were going to rely upon it. That is the whole point.

Mr. F. W. Lyon: Well, I intend to.

The Court: Is it your contention, then, Mr. Lyon, that by placing it in the situation here they have waived their right to the 30 days' notice?

Mr. F. W. Lyon: That is one contention; and the other one is that under the New Rules notice is no longer required. If there is a question by the court, I will brief that issue for you. [130]

The Court: I believe, unless prejudice is shown and it would require some preparation for trial on that particular patent, and there does not seem to be in the record, that I will overrule the objection of the plaintiffs. Proceed.

Mr. Mason: As I say, I won't take up time, your Honor. I do not think it is material, anyway. But, for the purpose of the record, I wanted to offer an objection to it.

The Court: All right.

* * * * *

I would like to call Mr. John Hackstaff.

JOHN D. HACKSTAFF

called as a witness by defendant, being first sworn, was examined and testified as follows:

The Clerk: Your full name, please?

The Witness: John D. Hackstaff, H-a-c-k-s-t-a-f-f.

Mr. F. W. Lyon: I understand that Mr. Mason is willing to stipulate to the qualifications of the witness as an expert.

(Testimony of John D. Hackstaff.)

The Court: We will take the afternoon recess.

Mr. Mason: As a patent expert, I will stipulate.

(Short recess.) [140]

The Court: Proceed.

Direct Examination

By Mr. F. W. Lyon:

Q. Did you give your name and address?

A. 1661 South Oxford Avenue, Los Angeles 6, California.

Q. Mr. Hackstaff, will you state your qualifications as a practicing engineer?

A. I graduated from Stephens Institute of Technology in 1898 with a degree of mechanical engineer, and have practiced that profession continuously ever since. Subsequent to leaving college I was employed by the Rockwell Engineering Company of New York, who built furnaces for manufacturing purposes, for every conceivable object, from singing cotton cloth to making cartridges for the Army and 16-inch cannon for the Navy. I spent quite a lot of time up in the brass rolling companies and brass cutting up companies in the Naugatuck Valley. I became familiar at that time with the practices in such shops.

In 1906, with some associates I formed the Hope Engineering Company of Pittsburgh, Pennsylvania, who were contracting and consulting engineers, and contractors, in the natural gas business. In connec-

(Testimony of John D. Hackstaff.)

tion with this work I built pipe lines and gas distribution systems throughout the United States.

In 1912 I came to Los Angeles for the J. G. White Corporation, to rehabilitate the Midway gas line from Taft to [141] Los Angeles, and spent three years introducing natural gas to the city of Los Angeles.

I then went back to Oklahoma and Texas, where, from 1916 until 1922, I was the vice-president and general manager of the Empire Pipeline Company, one of the major pipeline companies of the United States.

In 1922 I came to Los Angeles as a consulting engineer, and have practiced that profession here ever since. In 1926 I was employed by the City of Los Angeles for a year and a half in cases before the Railroad Commission, which materially arose in connection with the serving of straight natural gas to the city instead of mixed gas, which had previously been employed. Since 1925 I have served as a consulting engineer on technical problems in patent litigation. In the course of this consulting work I have examined hundreds of patents. I have analyzed their specifications, their drawings, and their claims. I have compared the specifications and disclosures of the patents with different devices, both as to whether they were similar or whether they were dissimilar. Among the clients for whom I have done this service and been retained are the Standard Oil Company of California, the General Electric Company, the Westinghouse Company, the

(Testimony of John D. Hackstaff.)

Natural Tube Company, the Distillate Corporation, and many others.

Q. Are you familiar with the use of machine tools?

A. By observation of them in actual practice years ago, [142] and by what has been disclosed in the patents which I have examined.

Q. Are you familiar with the use of jigs and dies, and so forth? A. In general, yes.

Mr. F. W. Lyon: Any cross-examination as to his qualifications?

Mr. Mason: What, if any, experience have you had in the manufacturing and assembly of sheet metal clamps, Mr. Hackstaff?

The Witness: None, Mr. Mason.

Mr. Mason: That is all.

Q. (By Mr. F. W. Lyon): Have you read and analyzed the disclosures of the patents in suit?

A. I have.

Q. And the various patents introduced here in evidence as Exhibit H?

A. I have examined and analyzed the disclosures of the patents in evidence, including the A. T. S. Patent 413,403, the Rocroy Patent 443,683, the Blanc Patent 2,136,875, the DeMooy Patent 2,159,655, which I will henceforth call the first DeMooy Patent, and the DeMooy Patent 2,269,188, which I shall refer to as the second DeMooy patent, and the Webb patent 2,256,634.

Q. You have also examined the Wallace patents, Exhibits H-10 and H-11? A. Yes.

(Testimony of John D. Hackstaff.)

Q. As evidenced by these patents, Exhibits H-1 to H-11, will you state the condition of the sheet metal temporary rivet art from 1935 to the date of the patents in suit?

A. The situation in regard to the sheet metal art, as disclosed in the patents in suit, as it existed in 1935, is set forth in full by the patent of Blanc, H-5, in which he says:

“Heretofore, it has been found in practice that before plates or the like could be riveted together, it was necessary for the workman to first secure the plates together by screws or bolts, which were inserted in the holes provided to receive the rivets. This long and expensive operation was necessary not only to secure the plates together but also to assure a perfect coaxial alignment of the rivet holes. In a great number of cases, this operation necessitated two workmen, one on one side of the work for inserting and holding the bolt in place, and the other on the other side of the work for screwing and tightening the nut on the bolt. It is therefore an object of this invention to produce a plate securing and locating device which is applied to or removed from the work from only one side thereof, thus eliminating the assistance of another workman from the [144] opposite side of the work.”

That was the condition in 1935.

Q. Now, will you describe in chronological order the condition of this art from that date on?

(Testimony of John D. Hackstaff.)

A. In 1934 the A. T. S. Company received a patent from Great Britain, No. 413,403.

The Court: That is Exhibit H-3?

The Witness: H-3. This he called an improved clip for holding sheet metal together, and he faced exactly the same problem that Blanc faced when he made his French application about contemporaneously.

The A. T. S. Company, as shown in simplest fashion on Figure 6 of that drawing, shows that he had a body which rested against the plate to be fastened together. Attached to this body was a mandrel——

Q. (By Mr. F. W. Lyon): Would you refer to the number given in Figure 6 of that part?

A. This body or housing, as he called it, the body or housing is element 36 in Figure 6. Slidable in this housing he had a retaining pin or sleeve, which he numbered 38, 39 and 41, which was composed of a number of flexible fingers at its lower end.

I will say here that in discussing these patents that they all used different nomenclature. They called the same things by different names, and they used the same name for [145] different things. So that they use the words “inner end” and “outer end” in an ambiguous fashion. From now on, in talking about these clamps I shall always refer to the part of the clamp which sets against the work to be performed as the bottom of the clamp. The top—the part of the clamp which is away from the work is the top of the clamp.

The A. T. S. patent shows a set of fingers which

(Testimony of John D. Hackstaff.)

protrude through a hole in the bottom of the clamp, which have enlarged ends of pins.

The Court: I believe you referred to A. T. C. I thought it was A. T. S.

The Witness: A. T. S. I beg your pardon.

Attached to the body or housing of the clamp is a mandrel, which also projects out forward of the body, beyond the body, through the hole in the center of the body between the pins. It is a characteristic of this mandrel or spreader or enlarger that it does not have any movement, longitudinal movement relative to the body. The pins which slide actually with the body have this characteristic: When they are protruded some distance out beyond the body, they can enter the rivet hole. At this place the ends of the pins are not in contact with the spreader. When the pins are withdrawn back into the body so that they are nearer the end and coact with the spreader, they then will not pass back through the hole in the body. They act then somewhat like a barbed fish spear. There is a spring which is positioned so that it presses downward against the body and presses upward against the head of the pins. This combination in the A. T. S. patent he calls the spring 40, and he calls the mandrel 34.

Q. By "mandrel" you mean either spreader, mandrel, or anything synonymous?

A. Yes, sir. He calls it a mandrel.

Q. What are the basic elements of a fastener, as disclosed by this A. T. S. patent?

(Testimony of John D. Hackstaff.)

A. A body which rests on the sheets with a retaining pin which is longitudinally movable through the body and projects out beyond the bottom of the body; a spreader, which is attached in some way to the body, which allows the pins to be brought coaxially together to pass through the hole when they are projected some distance below the mandrel, but which slides down so they cannot be retracted through the hole when they are brought up with the mandrel near the body; and a spring which acts between the body and the head of the pin, tending always to retract the pin into the body.

Q. One of the specific features taught by this patent is that the combined diameter of the retaining pins and the spreader or mandrel must be substantially the same as the diameter of the riveting holes into which it is to be inserted; is that not true?

A. The pins have an enlargement on their lower end. [147] The combined diameter of the mandrel and the pins above the enlargement, before they are enlarged, fill the rivet hole. The combination of these four elements, the housing, the retaining pins, the spreader and the spring are a true mechanical combination. I shall refer to the housing in the future as the housing element A, the retaining pins as the element B, the spreader as the element C, and the spring, retracting spring, as the element D. The four, working together, form a true mechanical combination, and the A. T. S. people were allowed by the British a claim on this simple mechanical combination, which is Claim 1 of the patent, and which

(Testimony of John D. Hackstaff.)

reads, "A device for the purpose described comprising essentially a body, a stem of two or more members which stem is adapted to pass through holes in the sheet metal structure so that its end remote from the body protrudes from the structure and comprising also means operable from the body to expand and contract the protruding end of the stem and to draw one or more of the stem members forcibly upward to the body."

Q. After the A. T. S. patent, what was the next step in the art?

A. A year later Rocroy obtained a British patent, 443,683, for the same purpose. Rocroy's device had the four elements that the A. T. S. had, with the exception that instead of using a spring to retract his retaining pin, he threaded the upper end of the pin and used a nut, screw nut, so he had to screw the nut. The action, however, of the combination, if you will assume that the nut and its thread are for the purpose of retracting the spring, or, the equivalent of retracting the pin and are equivalent to the spring for performing the same function, it is identical.

Q. Just one moment before you go forward. Mr. Hackstaff, did not the A. T. S. patent also teach that you could use either a spring or a nut and bolt or various other mechanism for securing the tension?

A. Yes. In the A. T. S. patent Figure 3 shows a device where he uses a screw thread and nut to retract his mandrel, and he has other similar devices,

(Testimony of John D. Hackstaff.)

but they all work on the same principal of retaining pins, which, when they are projected out beyond the end of his body, will pass through the hole, but when they are withdrawn by any means whatever to a predetermined distance from the body, where they coact with his spreader, they won't pass through. That is the essential feature of the patent.

Q. Now, will you point out in detail what is shown in the Rocroy patent?

A. Rocroy formed his retaining pin—Rocroy, in the first place, had his body, which he called a sleeve.

Q. What is the number?

A. 13. He calls his retaining pin a rod, which he numbers 1, 2, 3 and 4. This rod is screw-threaded at its [149] upper end and it is split at its lower end into two bifurcated pins. Each of these pins has at its bottom, at its outward end, heads or barbs. Rocroy makes his spreader in the shape of a T. He places the cross arm of the T somehow in the end of his body. Either he drops it in or drops it into a slot. The drawings are quite ambiguous as to exactly what shape it is in there, but he says he attaches it to the body, and it is perfectly plain from the drawing, from the shape of the T in the end of the body. The cross arm of the T is in the body. The stem of the T projects outwardly down from the body, and is positioned between the two halves of the two retaining pins, so that when the clamp is in use the area of the two retaining pins, plus the area of the T, fill up the rivet hole, and when the pin has been retracted so that it is spread by the

(Testimony of John D. Hackstaff.)

rivet, the heads of the barbs or pins will not go through the rivet hole.

Q. Have you finished with the Rocroy patent?

A. I think so.

Q. What was the next step in the art?

A. The next step chronologically in the art is the patent to Blanc, 2,136,875, which was applied for in France on May 13, 1935, and issued in the United States on November 15, 1938. This patent discloses a body which he calls a cap or a jaw, 15 and 16. He has a retaining pin, 10, 11, 12 and 14. He has a spreader and washer, 18 and 20, and he has a [150] spring 13. The body consists of a cup-shaped body, which he describes as follows:

“Slidably mounted on the pin 10, there is a cap or jaw 15 provided with an enlarged counterbore 16 centrally disposed therein and with an eccentric bore 17 of a diameter substantially equal to the normal diameter of the pin 10.”

In this case Blanc reverses the operation. He says that his body slides on the pin, while his predecessor says the pin slides inside the body. It is immaterial, because one slides by the other.

The Court: The motion is the same, whichever you call it?

The Witness: The motion is the same. If you look at the drawings of Blanc, in all of them you will see that what he calls his caps or jaw 13 is a cup-shaped body, exactly similar to the bodies of most of the clamps in evidence here, and exactly

(Testimony of John D. Hackstaff.)

similar to that shown in the patent in suit. It has a barrel circumference, and it has a bottom or end wall which is attached to and is an integral part in operation of the barrel.

Referring to the pin, he says, "10 represents a pin or elongated element which has the upper end thereof threaded to receive a head 11. The head 11 is provided with an annular recess 12 adapted to receive one end of a compression spring [151] 13 which surrounds the pin. The other end of the pin is pointed as at 14 for facilitating the insertion of the pin through the work.

"As previously stated, the pin 10 is made of cylindrical stock the cross section of which defines a circle mark 'A' in Fig. 6. For a portion of its length between the ends thereof, the pin 10 is eccentrically turned down or otherwise machined to form a reduced portion 22 slidable through the bore 17 of the cap 15. The cross section of this reduced portion of the pin is shaped as indicated by 'B' in Fig. 6. The forward end of the reduced portion of the pin produces with the normal forward portion of a bevelled shoulder 23 which is capable of engagement with the work as will be explained later."

He has a spreader. In counterbore 16, that is of his body, there is located in engagement with the bottom wall thereof a washer 18 having a radially disposed slot 19 extending somewhat beyond the

(Testimony of John D. Hackstaff.)

center of the washer and the width substantially equal to the normal diameter of the pin. The washer 18 is also formed with stem 20 depending therefrom and extending through the bore 17 of the cap 15. This washer with the depending stem is functionally the equivalent of Rocroy's T-shaped spreader.

As seen by Figure 6, when in operation the area of the stem added to the area of the cut-down section of the pin is equal to the diameter of the rivet hole, so it fills it solid just exactly as shown by Rocroy and as shown by [153] A. T. & S. He also has a spring which functions at all times to tend to retract the retaining pin back into the housing.

The upper abutment of this spring is the head of the pin; the lower abutment is upon the washer which sits upon the end wall of the housing. Blanc shows that his spreader or his clamp is to be used with an applying tool, and he indicates roughly, diagrammatically, such an applying tool. The applying tool, in principle, is the same as the guns that I have seen placed in evidence here.

Q. Those guns have nothing to do with the invention? A. Have nothing to do.

Q. The alleged invention?

A. They are simply specially formed pliers, and the action of the plier in every case when it is applied to the clamp is to squeeze the spring and thus force the retaining pin out through the bottom hole of the housing. To do this they have got to push upward. Since these guns act or are applied to a

(Testimony of John D. Hackstaff.)

flange or handle on the housing and on the top of the head of the pin, the only way that the force of the plier can be attached to the spring is down through the side walls of the housing and upward through its bottom which is attached to the side walls. If the bottom was not attached to the side walls, why, there would be no effect whatever; it would not work. [154]

Blanc uses the A-B-C-D-combination of a mechanical element, the A-B-C-D-element mechanical combination that was employed by Rocroy and the A.T.S. If you will analyze Blanc's claims, it is evident that he does not in any way, shape or form claim to be the inventor of this combination. All his claims are specifically limited to the type of rod he uses and its enlargement and the protruding finger.

Q. In other words, Blanc contributed, if anything, to the art one small detail?

A. He contributed specifically a specific design of a spreader and retaining pin, and he only claimed that.

Q. What is the next step in the art, Mr. Hackstaff?

A. In 1937, DeMooy made application which materialized in patent 2,159,655, issued on May 23, 1939. A comparison of the DeMooy and Blanc drawings shows that they are almost identical. You might look upon them almost as variations of one inventor in the same patent application.

DeMooy has a housing 10 which is exactly similar

(Testimony of John D. Hackstaff.)

in form and function to Blanc's housing 15 and 16. He has a spreader 20 which is a stem projecting downward from the housing. He has a retaining pin 20, 21, 22, and 23 which is identical with Blanc's, with the exception that he keeps it full size all the way and bends the end. He shows a different type of head to the pin. He shows the head of the pin being always inside the barrel, while Blanc puts it there as a kind [155] of a cap outside. That is immaterial because they actually function exactly the same way.

DeMooy shows that his spreader, through looking at the drawing, is cast or formed integrally with the bottom of the housing, as contrasted with Blanc's finger, which is attached to a washer and dropped into the housing and held down with a spring.

DeMooy uses exactly the same A-B-C-D-combination as the predecessors; and an examination of his claims shows that he also thinks that his invention consists solely in the form of the pin, because each one of his claims states:

“a pin of uniform diameter * * * having an end portion bent to an obtuse angle”.

He shows, in Figure 5, that the area of the pin and the spreader when it is in the hole is approximately equivalent to the area of the hole so as to hold the plates in alignment.

Q. What is the next step in the art, Mr. Hackstaff?

A. On March 15, 1940, DeMooy applied for his

(Testimony of John D. Hackstaff.)

second patent, which was issued on January 6, 1942, as patent 2,269,188.

MR. F. W. LYON: Just a minute, Mr. Hackstaff. I do not know whether your Honor is familiar with the Davis-Bournonville case. As you will note, this last patent, which would be after the first patent in suit, but was filed [156] more than one year prior to the patent in suit, and to show that that is evidence of a prior invention, I refer your Honor to the case of Alexander Milburn Co. v. Davis-Bournonville Co., 270 U. S. 390, wherein a prior applied for, but subsequently issued, patent is prior art and evidence of prior invention.

MR. MASON: That is so conceded, your Honor, that the patent speaks from its filing date as to invention, and not prior publication.

MR. F. W. LYON: I just wanted to put that in now so there will be no question concerning this patent.

All right, Mr. Hackstaff.

A. This patent also employs the now conventional A-B-C-D-combination. It has a body 10, a retaining pin 20, 21, 22 and 23, a spreader 15, and a spring 25. The body pin is a short cup-shaped housing with a solid integral end or bottom having a hole through the center.

His retaining pin consists of:

“a retainer 20 which is formed of a piece of wire bent substantially as a hair pin with the free ends thereof each provided with a pointed

(Testimony of John D. Hackstaff.)

head 21 and forming an outwardly inclined lateral projection 22 engagable with the underside of the work as will be hereinafter explained. Each leg 23 of the retainer 20 extends through the bore 13, one on each side of the spreader [157] or vertical partition 15 with the tail portion 17 thereof located between the legs 23 of the retainer 20." [158]

This describes exactly the same construction that was illustrated in the Rocroy patent of 1934. The spreader 15, which is T-shaped, like Rocroy, has a longitudinally extending central or tail portion 17 extending beyond the lower end of the base of the housing 10 and capable of insertion into the aligned perforations of the sheets.

The pin has a head against which the spring 25 presses upward. The distinguishing feature of De-Mooy is that he positions his T-shaped spreader in a slot on the outer bottom face of his body.

He says, referring to the drawing:

"10 represents a cup-shaped housing formed at its upper end with an external annular flange 11, and having its lower end formed by a cross wall or base 12 having a cylindrical bore 13 extending centrally therethrough. The base 12 is provided with a laterally extending groove 14 passing through the center of the bore 13, within which groove is mounted a relatively thin spreader or vertical partition 15 which is secured therein by any suitable means such as

(Testimony of John D. Hackstaff.)

by partly closing the outer ends of the groove
14 as at 16."

This merely says that in order to attach his spreader and fix it so that it will not move longitudinally with the body, the DeMooy cuts a slot on the bottom of his body, [159] inserts the crosshead of the T in it and peens down the edges of the slot. This is a construction practically similar to that which can be seen in the Rocroy drawings.

Q. How does that construction differ from the patent in suit '787, if any?

A. Exactly the same, with the exception of his method of holding the spreader in the slot.

Q. Is there any mechanical difference from clamping the slot closed over the top of the T and in putting the cover cap over that slot?

A. They both perform exactly the same function, as far as that is concerned; and their purpose is to hold the T in the slot. The main difference between——

Q. Could the clamp shown in the DeMooy, the second DeMooy patent, be assembled in identically the same manner as illustrated in Exhibit 20?

A. It would be a little easier, because you would not have to insert any cap over it. All you would have to do would be to insert the pins through the relatively short housing, by some fixture compress the spring so as to project the pins a distance beyond the bottom of the housing, slip the T in between the two legs of the pins in the slot, remove

(Testimony of John D. Hackstaff.)

the pressure on the spring, and then after, at your leisure, peen in the head of the slot.

Q. Now, you have referred here to a T-shaped spreader. [160] I will have you look back to the patent to A. T. S. Company, in Figure 6, and ask you if that is not a T-shaped spreader?

A. 34 on Figure 6 has a mandrel which was inserted into a head, the cross section of which is a T.

Q. Could that spreader be inserted from the bottom, from the outside of the bottom of the barrel?

A. No. It would have to be inserted in through the top of the barrel. If it had been assembled, the drawing shows that the mandrel, as indicated right opposite the end of the line 35, as if the mandrel was screwed into the crosshead. In assembly it might have been that it would be, therefore, possible as a last step to screw the stem of the mandrel 34 into its head.

Q. I call your attention to the threads at the top end of that mandrel 34, and ask you if you took into consideration the fact that that is threaded in when you made your answer that it could not be inserted from the outside?

A. No. If you cut your T or your mandrel in two parts, then you can assemble the mandrel. Functionally, it is immaterial whether the mandrel and this head be in one piece or in two pieces; it is purely a matter of convenience in fabrication.

Q. But he does show it so that it could be assembled from the outside of the bottom?

A. Yes, sir; that is, he can assemble the stem

(Testimony of John D. Hackstaff.)

from [161] the outside of the bottom, but not the crossbar.

Q. Now, will you compare the elements described in the second DeMooy patent and the elements described in the specification of the first patent in suit '787?

The Court: You will not be able to conclude with this witness tonight?

Mr. F. W. Lyon: No, sir.

The Court: Recess until ten o'clock tomorrow morning.

(Whereupon, a recess was had until 10:00 o'clock a.m., Friday, January 24, 1947.) [162]

Los Angeles, California,
Friday, January 24, 1947, 10:00 A.M.

The Court: Mr. Cross will call the calendar.

(Case called by the clerk.)

The Court: Both sides are ready?

Mr. F. W. Lyon: Yes, your Honor.

Mr. Mason: Ready, your Honor.

The Court: Proceed.

Mr. F. W. Lyon: Take the stand, Mr. Hackstaff.

JOHN D. HACKSTAFF

called as a witness on behalf of the defendant herein, having been previously duly sworn, resumed the stand and testified further as follows:

(Testimony of John D. Hackstaff.)
Direct Examination
(Continued.)

By Mr. F. W. Lyon:

Q. Mr. Hackstaff, I believe you were preparing to compare the disclosure shown in the second De Mooy patent with the disclosure of the first patent in suit, '787?

Mr. Mason: I think he made that comparison.

Mr. F. W. Lyon: No, that was the last question before we recessed.

The Witness: The De Mooy patent, 2,269,188 and the Wallace patent, 2,365,787, are in the same art. They are for devices for exactly the same purpose. Each of these devices employs the basic mechanical combination first claimed in [164] evidence by the A. T. S. Company. The four-element combination, consists of a housing; a retaining pin which is slidably mounted in the housing and projecting through a hole in the bottom of the housing; a spreader attached to the housing; and a compression spring. The devices illustrated in the De Mooy drawings and the Wallace drawings are practically identical, with one minor difference.

A comparison of the Figure 4 of the De Mooy drawing, when placed alongside of Figure 5 in the Wallace drawing, will illustrate how closely they resemble each other. The De Mooy drawing shows that he has a housing which he calls 10, which has a cross wall or base 12, a hole in the center of the base 13, a groove in the outer face of this base 14, and

(Testimony of John D. Hackstaff.)

an outer flange 11. The Wallace body or housing, as illustrated in Figure 5, has a body pin, with an interior bore 11, an integral end wall 12, and a hole in its center 15, a slot in its outer surface 16. The devices shown in the two drawings are exactly the same. The De Mooy patent has a retaining pin——

The Court: Now, there are two De Mooy patents.

The Witness: This is De Mooy Patent '188, the second De Mooy patent.

The Court: I understand.

The Witness: He has a retaining pin or retainer 20, which has two bifurcated legs, 21 and 23, with barbs at their outer points where they project through the hole in the base [165] of the housing 22, and a head inside or above the bottom of the housing 24.

The Wallace patent in Figure 5, which is similar to all the other figures, discloses a split clamping pin 19, with bifurcated legs 22 and 22a, barbs at their points 80 and 80a, and a pin head or plunger at its upper end, 23 and 20.

Both patents have spreaders. The spreaders in both cases are T-shaped. De Mooy says that his T-shaped spreader has a cross arm 15, which he positions in a groove 14 on the outer face of the bottom, and that he has a leg 17 projecting downward and outward from the bottom of the body and positioned between the two bifurcated legs 23.

The Wallace T-shaped spreader has also a cross-bar 25 which is located in the slot 16 cut on the inside face of the bottom housing. It has a spreader.

(Testimony of John D. Hackstaff.)

That spreader has a leg 25a which is partitioned between the pins 22. The two spreaders in the two patents are exactly the same in shape. They are positioned in exactly the same place in their respective assemblies. They perform exactly the same functions in both assemblies and are identical in all respects.

Each of these patents has the fourth element in the combination, the spring. The DeMooy shows a spring 25 acting between the pin-head 44 and the bottom or end wall of the housing 12. Wallace shows a spring 34 acting between the pin-head 20 and 23 and the bottom wall 12. Thus far the two patent drawings and specifications are identical. They differ only in the feature as to how in the two devices their respective spreaders are to be retained in the slots. DeMooy says that you put the cross-bar of the spreader in the slot and then you crimp down the edges of the slot over the spreader. Wallace says that he applies a cap over the outside face of the bottom so as to hold the spreader in the cap.

Wallace's cap performs an additional function. The bottom wall or end wall of the previous devices, such as Blanc and the first DeMooy, were smooth except for a hole in the center and, therefore, not liable to mar up the sheets, soft sheets, against which they were pressed. Both DeMooy [167] and Wallace cut slots in this engaging face which would be liable to deface the work. DeMooy does nothing to obviate this difficulty. The cap of Wallace pro-

(Testimony of John D. Hackstaff.)

vides a work-engaging surface, smooth work-engaging surface, which DeMooy does not possess.

With the exception of the means of retaining the spreader in the slot, and Wallace's provision of a smooth outside working surface, the two disclosures are identical in form and function and their modes of operation.

Q. The DeMooy, as described in the second DeMooy patent, and the Wallace fastener from the patent '787 are assembled in identically the same manner?

A. Since they are identical in essential form and arrangement of parts, any assembly which was possible in the Wallace patent is also possible in the DeMooy patent; and anything which was impossible in the Wallace patent is also impossible in the DeMooy patent, and vice versa.

Q. What is the main function or functions of the spreader in these devices?

A. The spreader in these devices has two functions. This is described by Rocroy in his patent 443,683.

The Court: I do not have that one.

Mr. F. W. Lyon: It is in the book, your Honor.

The Court: Oh, all right.

Mr. F. W. Lyon: I assembled all the patents we referred [168] to in this case in that one book for your assistance.

The Court: All right; proceed.

A. Where he says, beginning——

The Court: Now, where are you?

(Testimony of John D. Hackstaff.)

The Witness: On Rocroy.

Mr. F. W. Lyon: What line?

The Witness: Page 1, line 52.

The Court: All right.

A. "Between the arms 4 and 5, there is fitted into the slot 3 a slide 11 of inverted T-shape of which the cross piece or base 12 is secured to a sleeve 13"—

Q. (By Mr. F. W. Lyon): He means by "sleeve" there what we have been calling body or housing? A. Yes.

"capable of sliding on the screwed rod, its movement towards the head 6 spreading apart the arms 4 and 5 consequently, when the tool is in the condition shown in Figs. 3 and 4, causing the shoulders 7 to engage with the outer surface of the sheet 10 thus acting as a bolt-head. The rivet hole 8 is filled exactly and no play is left."

It is plainly shown in Figures 3 and 4, to which this description refers, that one of the features of the T-shaped spreader in the Rocroy device was to completely fill the rivet hole, acting in connection with this operation with the two [169] bifurcated legs of the pin. This filling of the rivet hole is rather an important feature in any bolting-up device, because, if the rivet hole is not filled completely by the clamp when it is in operation, there is a possibility that the two sheets can shift laterally; and Rocroy saw this and provided for it.

(Testimony of John D. Hackstaff.)

Q. In every one of these patents you have referred to in your testimony and in both the patents in suit, this feature of a spreader and a retaining pin to fill the hole is present; is that not true?

The Witness: Will you read that, please?

(Question read by the reporter.)

A. Yes.

Q. I believe on the drawings of certain of these patents you have colored the drawings so as to show the elements that you have referred to. Would you refer to those drawings and tell us which color applies to which element, naming the patent, first, that the drawing is from?

Mr. Mason: Hadn't you better identify those?

The Court: Mark them for identification so that we may have a reference to them.

Mr. F. W. Lyon: All right. I will offer the following three drawings from the following patents as Defendant's next in order: These are the patent to Blanc, 2,136,875—

The Clerk: That will be Defendant's Exhibit I for [170] identification.

Mr. F. W. Lyon: I ask that they be offered into evidence, only to illustrate the witness' testimony so that we do not have to come back.

Mr. Mason: No objection.

The Court: There is only one Blanc?

Mr. F. W. Lyon: Yes, sir.

The Court: All right. That is "I," Mr. Cross?

The Clerk: Yes, your Honor; I in evidence.

(Testimony of John D. Hackstaff.)

The Court: All right.

Mr. F. W. Lyon: And the patent to DeMooy, which, for your Honor's reference, is the second one, 2,269,188, as Defendant's next.

The Clerk: Defendant's Exhibit J in evidence.

Mr. F. W. Lyon: And the patent to Wallace, 2,365,787, as Defendant's next.

The Clerk: Defendant's Exhibit K in evidence.

The Court: Now, wait a minute. There are several Wallace patents.

Mr. F. W. Lyon: This is the first one in suit, '787.

The Court: Oh, yes. "K," Mr. Cross?

The Clerk: Yes, your Honor.

The Court: All right.

Q. (By Mr. F. W. Lyon): I give you Defendant's Exhibit I and ask you what is illustrated by the various colors you [171] have placed on there and what you intend to mean by them?

A. I have on Exhibit I——

The Court: Go ahead.

A. I have colored the cup-shaped housing with its end wall in green. I have colored the retaining pin with its barbed outer end and its head top end red. [172]

I have colored the spreader and the washer to which it is attached yellow. I have not colored in this drawing the spring.

Q. Would you color that spring blue?

A. Blue.

(Testimony of John D. Hackstaff.)

Q. Are those the four essential elements that you have been testifying to?

A. Those are the four essential elements of the basic A, B, C and D combination, of which I have testified.

Q. Now, will you use Defendant's Exhibit J and explain the coloring on that drawing?

A. I have used the same colors for the same respective elements on Exhibit J, which is the De-Mooy Patent 2,269,188. The housing and its bottom is blue.

Q. It is green, isn't it?

A. It is green. The retaining pin with its head is yellow. The spreader is yellow and the spring is blue.

Q. Now, I will give you the Defendant's Exhibit K, and before you go any further on that, would you illustrate to the court what part of those drawings is pertinent to this case? I believe there are certain parts that are not at all pertinent and we can dispense with them.

A. Not pertinent to this case are all the parts which are included in the applying tool or gun.

Q. Those are left uncolored in all the drawings?

A. Are left uncolored in all the drawings. If you [173] desire, I can cross them out.

Mr. F. W. Lyon: No. I think your Honor can see that the only pertinent parts to this litigation are the parts that he has colored here, and I think it will be stipulated that the gun and the rest of those drawings have no pertinency.

(Testimony of John D. Hackstaff.)

The Court: It has been stipulated many times. Mr. Mason said the gun had no part in the issues here, except to illustrate it. Is that right?

Mr. Mason: That is right, your Honor.

Mr. F. W. Lyon: I just wanted the record to show.

The Witness: I have colored the housing, the cup-shaped wall, this end wall, green. I have colored the bifurcated retaining pin with its barbed lower end and its head red. I have colored the spreader situated in the slots in the face of the housing, the bottom of the housing, yellow.

I have also on this drawing colored the end cover cap 27, which is snapped on at the very bottom of the housing, to act as a retaining member for the spreader, holding the spreader in the slots of the housing and also to act as a smooth engaging surface, brown.

Q. (By Mr. F. W. Lyon): Now, have you examined the devices manufactured by the defendant charged to infringe? A. Yes, sir.

Q. Are you familiar with them?

A. I think so. [174]

Q. I hand you a chart——

The Court: Let us first have it marked for identification.

The Clerk: Defendant's Exhibit L for identification.

Q. (By Mr. F. W. Lyon): I will ask you if that chart was made under your supervision.

A. It was.

(Testimony of John D. Hackstaff.)

The Court: What does it represent?

Q. (By Mr. F. W. Lyon): What does that chart represent?

A. This chart represents in cross section the devices which are in evidence here as Exhibits 11 and 12.

Q. The defendant's fastener? A. Yes.

Q. Now, I notice that you have colored that chart. Would you explain the coloring there and compare it with the coloring on these other three exhibits?

A. In these charts I have colored the housing with its integral end wall green. I have colored the retaining pin which goes out through a hole in the center bottom of the housing with its engaging barbs and top red. I have colored the T-shaped spreader which is inserted inside of the housing above the bottom of the housing yellow. And I have colored the spring, which presses down and abuts at the lower end against the housing bottom and its upper end against the head of the retaining pin, blue.

Q. I think you are in slight error there. The lower [175] end of the spring engages the top of the T, does it not?

A. The lower end of the spring rests on top of the T, which is setting loosely in the bottom, so that the T simply acts as a washer to transmit the force of the spring to the bottom. The T itself has no power outside of the fact that it rests upon the bottom, withstanding the force of the spring. The spring really holds the T down against the bottom.

(Testimony of John D. Hackstaff.)

Q. Now, I notice you have stippled in red a part here. What is that?

A. These are the sheets. This is supposed to represent the sheets with which the tool is employed. There are three sections which in some manner would represent two overlapping skins and the rib member to which they are attached.

Q. They are not a part of this device?

A. They are not a part of the invention. They are exactly the same as the sheets that are illustrated in the De Mooy patent——

The Court: Just turn that over. It has a number.

The Witness: ——De Mooy patent, Exhibit J. In Figures 5, 6 and 7 it shows the device in use.

Q. (By Mr. F. W. Lyon): In these exhibits, I, J, K and L the same color represents the same part?

A. Yes, sir.

Mr. F. W. Lyon: I offer in evidence Defendant's Exhibit L. [176]

The Court: Admitted.

The Clerk: L in evidence.

Q. (By Mr. F. W. Lyon): Would you compare the body of the first patent in suit '787 and the body of either Exhibit 11 or Exhibit 12, Defendant's devices?

A. The body of Patent '787—what is the number of the exhibit?

The Court: H-1?

Mr. F. W. Lyon: Yes, H-1.

The Witness: ——H-1 is identical with the body of the defendant's devices as shown on Exhibits——

(Testimony of John D. Hackstaff.)

Q. (By Mr. F. W. Lyon): 11 and 12?

A. —11 and 12, and as shown on this drawing which has just been introduced, with this exception, that the patent shows the bottom end wall, 12, of the patent, as being made in one piece with the barrel of the body.

In the defendant's devices, as shown in this drawing, the body is made in two parts which are rigidly attached one to the other, so that to all intents and purposes when the two bodies taken by themselves are compared, they are the same.

There is no difference in a Royal Baking Powder can, between the can body and the top. The can body is made out of the sheet of metal, which is rolled into a cylinder and with a bottom attached to it permanently. The top of the Royal Baking Powder can is pressed out of a solid piece of metal in [177] a punch press and is all in one piece, but they are the same structure.

Q. Now, then, the body of the patent in suit '787 is a one-piece construction?

A. Is a one-piece construction.

Q. The body of the defendant's clamp, shown in Exhibit 11, is a two-piece device?

A. Is a two-piece structure, formed together so that there is no motion between them. They become integral in operation.

Q. Now, the patent in suit '787 has a cap 27 on the outer end of the body. Is there any comparable part on the defendant's structure exemplified by Exhibit 11?

(Testimony of John D. Hackstaff.)

A. Exhibit 11 has no cap of any kind that is comparable with the cover cap 27.

The Court: As shown on Exhibit No.—

Mr. F. W. Lyon: As shown on Exhibit 16.

The Court: On Exhibit 16, that is right.

Mr. F. W. Lyon: That is the same number as in the patent, your Honor.

Q. (By Mr. F. W. Lyon): The outer end of the defendant's device finishes the body?

A. The outer end of the defendant's device is the bottom of the body.

Q. And the cover cap on the patent in suit, has it any [178] purpose that is not present in the defendant's clamp?

A. The defendant's clamp has no slots on the outer end of the body. The patent in suit has slots on the outer end of the body, in which to insert the cross arm of the spreader. In this respect it is exactly the same as De Mooy's. The cap of the patent has, besides holding the slot, the spreader in the slot, which furnishes a smooth bottom surface by which the clamp can engage the work.

Since the defendant's device has no slots, it does not require any such superficial element to obviate the roughness for sharp corners of the slots.

Q. Would you compare the defendant's device, as exemplified by Exhibit 11 or 12, with the patent of Rocroy, Exhibit H-5, I believe it is—H-4.

The Court: H-5 is the Blanc patent.

Mr. F. W. Lyon: H-4.

The Court: H-4 is the Rocroy.

(Testimony of John D. Hackstaff.)

The Witness: Both devices have an outer body. The bottom end of the body rests upon the top of the sheet. Both devices have within them a slidable retaining pin, which at its lower end is in the form of two bifurcated pins which have barbs on their lower ends, and which have a head or some feature on their upper ends by which the retracting element can be attached. In the Rocroy device this is a screw thread on the pin. In the defendant's device this is an enlarged [179] head on the top end of the pin. Both devices have T-shaped spreaders which are positioned inside the body on its lower end.

In both devices the shank of the T projects down below the bottom of the body, so that it can be inserted into the rivet hole.

Q. One minute. As to the head of the cross arm of the T of either Rocroy or defendant's device, is that positioned outside of the body?

A. No, sir. That is of the cross arm of the T?

Q. That is right.

A. The T in both cases is positioned athwart the retaining pin so that it fits into the slot between the two bifurcated pins. In both cases the area of the spreader and the area of the retaining pin, the normal area of the retaining pin, completely fills the rivet hole. In both cases when the pin is retracted toward the head, in Rocroy by means of the nut which coacts between the body and the screw thread on the rod and in the defendant's device by the spring which coacts between the bottom of the

(Testimony of John D. Hackstaff.)

body and the head of the retaining pin, the pins are expanded so that they cannot be retracted through the rivet hole. The only difference between the two devices is in the method of retraction and of the rod.

Q. How many pieces does the body or sleeve, as Rocroy calls it, have? [180]

A. Seemingly one.

Q. And how many pieces does defendant's body have?

A. One. When it is finished, it is one piece. It is made up of two pieces which are joined together. The body itself is one. It is made up of a bottom, which is spun onto a cylindrical barrel in fabrication. After it is fabricated, it is the same thing and always operates as a single piece.

Q. In other words, the defendant's body, instead of being made in one piece, is made in two pieces, and comes out the same identical body as shown in the Rocroy device?

A. Yes. It is also—— [181]

Q. Now, will you turn to the patent to Webb, 2,256,634, Defendant's Exhibit—I believe it is H-8—and describe to us what is illustrated in that patent?

A. The patent to Webb, 2,256,634——

Mr. F. W. Lyon: One minute. For your Honor's information, this patent is only used as anticipation to the second Wallace patent in suit, has nothing to do with the first one as it is not early enough to anticipate the first patent.

A. The device illustrated in the drawings and specifications of the Webb patent is for exactly the

(Testimony of John D. Hackstaff.)

same purpose as Rocroy, Blanc, and the first De Mooy devices, for those illustrated in all the Wallace patents, and in the devices manufactured by both the plaintiff and the defendant in evidence in this case. Webb calls his device a "basting clamp." In Webb's device he has the identical A-B-C-D primary combination first claimed by the A. T. S., a housing and retaining——

Q. What is the number of the housing?

A. The housing which he calls a body 11, a retaining pin, composing which he has a cap 16, a cotter-pin 12, and legs 22 providing a bifurcated retaining pin. He has spreading means composed of a ring 24 and lugs 32; and he has a spring 29.

The form of Webb's spreader and the method in which it operates to spread the pins is quite different from that of [182] any of the other references or constructions. It is one variation of the basic elements C and D—the retaining pin and the spreader.

The operation, however, of the four elements is exactly the same as in all of the patents.

In addition to the four-element combination, he provides an additional feature. In the operation of the DeMooy patent 2,269,188, as is illustrated in Figure 1, the only thing that retains the tension on the spring before the device is used, and as illustrated in Figure 7, when the device is being used, is the engagement of the barbs of the retaining pin, either on the bottom of the housing, in the first instance, or on the sides around the rivet hole, in the

(Testimony of John D. Hackstaff.)

second instance. If for any reason these barbs should be sheared off or the pins broken, the retention of the compression on the spring would be released and the spring would be able to shoot the retaining pin to eject it out from the housing.

In order to provide against such a contingency Webb proposed a certain locking or stop. He provides an inward-looking flange or lip on the top end in his housing. This lip is 15 in the drawings. He provides that the head of his retaining pin which slips inside of these lips shall have an outward-looking flange within the barrel of the housing below the lips, so that if in use or at any time the holding action of the barbs of the pin was destroyed or was lost, [183] this outward-looking—the engagement of these two elements, the flange 20 on the head of the pin and the lip 15 on the top end of the housing, would prevent the ejection of the retaining pins from the housing.

Q. What, if anything, has Webb added to the state of the art?

A. Webb added to the state of the art this additional safety stop.

Q. He used the original four basic elements?

A. He used the original four basic elements.

Q. And added a safety flange?

A. A safety flange, which does not come into operation in the operation of the device unless something happens to the device which is not expected to happen.

(Testimony of John D. Hackstaff.)

Q. Now, will you compare the Webb disclosures, Exhibit H-8, with the disclosure of the second Wallace patent in suit, the '408 patent, Exhibit H-2?

A. The second Wallace patent, 2,236,408, Exhibit H-2, embodies the main four-element basic combination of all the prior patents and of the art. In addition to that, this patent discloses at the top of the head of his pin and coacting and moving with it, what he calls a thimble 17 which has a shoulder on the lower end 33. This thimble he provides on his housing, an inwardly-looking flange at its top 16. If for any reason the barbed head of the pins failed to [184] restrain the expansive force of the spring, the bringing up of the shoulder 33 on the top of the head of the pin or thimble, coacting against the shoulder 16, would prevent the ejection of the pin and its head from out of the barrel.

Q. Would you while you are making the comparison point out the parts in the Webb patent, if you have comparable parts, at the same time?

A. A comparison of the drawings of the Webb patent, Exhibit H-8, with those of the Wallace patent, Exhibit H-2, shows that both have thimbles or heads surrounding the top portion of their pin. Wallace's thimble is 17; Webb's thimble is 16. Both of these members extend out beyond the top end of the housing. Wallace has an inwardly-looking flange at the top of his housing 16; Webb has inwardly-looking lips 15, both in the same place for the same purpose.

(Testimony of John D. Hackstaff.)

Wallace, on the bottom end of his thimble, has an outwardly-looking lip 33. Webb has an outwardly-looking lip 20, both in the same location, on the top of their pin, both for the same purpose. One is identical with the other, practically, in form and function—practically, in form, and identically, in function.

Q. Now I will ask you to take the second claim of the Wallace patent in suit '408, Exhibit H-2, and will you take the elements, element by element, and show what part of the patent in suit is represented by that element and whether [185] or not you find that identical part and its number in the Webb patent?

A. As stated before, the form of the Webb retaining pin and the form of the Webb spreader is quite different from all of the other clamps either shown in the patents or in the art.

Webb's elements, however, perform exactly the same function that those of Wallace do, though not quite in the same way.

Q. Then, as I understand your testimony, the difference between the Webb patent and the claims of the patent '408 in suit is merely a matter of nomenclature?

A. No; not of the claim—of the operation of the device.

Q. The operation of the devices is the same?

A. Basically.

I will now answer your question in which you asked me to take the claim, element by element.

(Testimony of John D. Hackstaff.)

The Wallace patent '408 discloses a clamp with a safety stop added. The claim reads:

“a cylindric body”——

This is shown in Webb by his body 11.

“an end cap mounted on the body in position closing the outer end thereof”——

Webb has an end cap illustrated in gasket 28.

“said cap presenting an opening therethrough, and a work-engaging outer surface, a plunger reciprocally mounted in the body, said plunger having a work-engaging member protractable and retractable through said opening,”——

This is the plunger 12, preferably made in the form of a cotter-pin, page 2, line 3.

“a spreader member having a laterally projecting inner end portion disposed in the cap”——

Webb does not have such a member.

“and an outer end portion projecting outwardly through said opening in engagement with the work-engaging member,”——

Webb does not have such a member.

“an inwardly disposed flange on the inner surface of the body adjacent its inner end,”——

Webb has such a member, his lips 15.

“a coil spring in the body around and retractively engaging the plunger”——

(Testimony of John D. Hackstaff.)

Webb has such a spring in exactly the same position, doing the same thing, spring 29.

“and tool-operated means for protracting the plunger against the pressure of said spring comprising”——

Webb has such tool-operating means. They are his head of his cap 16, which he calls, line 44: [187]

“A cylindrical cap 16 slidably fits within the upper end portion of the wall of the cylinder 13. This cap 16 has a side wall 17 and an upper end wall 18 providing a cylindrical recess 19. The outer surface of the wall 17 is formed with a downward facing annular shoulder 19a intermediate of its ends and an upwardly facing shoulder 20 near its lower end. As the cap 16 is reciprocally moved within the cylinder 13, the lips 15 serve as a stop to limit downward movement of the cap 16 upon engagement with the shoulder 19a and to limit upward movement of the cap 16 upon engagement with the shoulder 20.”

This tool-operating means is for protracting the plunger against the pressure of said spring. The claim further reads:

“a plunger-engaging member”——
which is the plunger 16.

“reciprocally mounted in and projecting from the inner end of the body for manual engagement,”——

(Testimony of John D. Hackstaff.)

This is graphically shown on drawings 1, 2, and 4 of the Webb patent.

“said member having a relatively increased diameter inner end portion engagable against said flange when the plunger is in fully retracted position.”

This refers to the flange 20 of the Webb tool-operating means. [188] As far as the tool-operating means and the stop are concerned, the patent reads specifically upon the Webb disclosure. As far as the means and elements employed for spreading the pins, and the spreader, it does not read upon the Webb disclosure but does read specifically upon the disclosures that are illustrated in patent 2,266,929, Exhibit H-11.

Q. Mr. Hackstaff, comparing patent '408, Exhibit H-2, with the Webb patent you find everything that is in that claim in the Webb patent other than the shape of the spreader?

A. The shape of the spreader.

Q. Now, the shape and positioning of that spreader is old; is that not true? A. Yes, sir.

Q. And the shape and the positioning of the spreader in the '408 patent is the same shape and position as that in the Rocroy and DeMooy patents, the second DeMooy patent?

A. The shape and position of the spreader in the patent '408 is identical with the shape and position of the spreader in the DeMooy patent, with this exception: In the DeMooy patent, like in the

(Testimony of John D. Hackstaff.)

Wallace patent '787, the spreader is inserted into grooves cut on the outer face of the end wall of the housing. In the patent '408 the end wall of the housing 9 is a plain disc which has been crimped into and made an integral part of the housing, and has no slots. The cross-arm of the spreader there is positioned in a space [189] below the bottom of the housing, which space is included between the bottom of the housing 9 and a dished cover cap 11 which is positioned and attached to the body below the bottom of the housing.

The patent '787 specifically provides that the spreader is held against rotation. The patent '408 specifically provides that the spreader is rotatably positioned in the space.

Q. Now, Mr. Hackstaff, would you compare the structure as far as the end cap and spreader are concerned of the Wallace patent 2,266,929 with the Wallace patent '408?

For your Honor's information, this Wallace patent, Exhibit H-11, was issued more than one year before the patent in suit '408.

The Court: Issued December 23, 1941, I have.

Mr. F. W. Lyon: And is therefore prior art.

The Court: And the application was filed August 23, 1941.

Mr. F. W. Lyon: That is right.

The Court: That is H-11. We will take our morning recess.

(Short recess.) [190]

(Testimony of John D. Hackstaff.)

Mr. F. W. Lyon: I had put a question to the witness to compare, your Honor, the lower end structure of the Wallace patent, Exhibit H-11—that is this portion of that patent (indicating)—with the Wallace Patent '408 in suit, Exhibit H-2, and I believe that Mr. Mason is willing to concede that there is no difference in these two patents except that the '929 patent does not have any method of locking in this thimble 17.

Mr. Mason: I will stipulate that the cap and spreader assembly of Patent '929 is equivalent to the cap and spreader structure shown in—

The Court: Patent '408?

Mr. Mason: —'408. Yes, your Honor.

The Court: In '408 the application was filed on April 9, 1943, and the patent was issued December 5, 1944, and in '929 the application was filed August 31, 1941, and on December 23, 1941, the patent was issued.

Mr. F. W. Lyon: Well, as to the prior art itself, there is no question on that.

Mr. Mason: There is no question on that: It is our position that this patent is an invention which produces a new and added result.

Q. (By Mr. F. W. Lyon): Mr. Hackstaff, the patent in suit '408, Exhibit H-2, is merely a combination of the Wallace patent, Exhibit H-11, the '929 patent, and the Webb patent, [191] Exhibit H-8, is it not?

A. It is the clamping structure of '929 patent added to the safety stop of the Webb structure, yes, sir. It is one plus the other.

(Testimony of John D. Hackstaff.)

Q. There is no mechanical difference between the Exhibit H-11, the Wallace '929 patent, and the '408 patent in suit other than the factor of peening the thimble into the body?

A. There is no difference whatsoever between the '929 patent and the '408 patent, with the exception that in the '408 patent they have added a feature which does not in any way, shape or form affect the device unless the device fails.

Q. Now, will you describe what is shown in the Rogers patent, Exhibit H-9?

A. The Rogers patent, 2,276,344, application April 18, 1941, is for what Rogers calls a connector. It is for a device for exactly the same purpose as all of the clamps which have been discussed in this case, both as illustrated by the patents and by the actual exhibits. It has the four basic elements of the housing, the slidable retaining member going through a hole in the bottom of the housing, a spreading member attached in some manner to the housing,—

Q. Give the numbers of these parts, please.

A. It has a housing which he calls a case 13 provided with a cover 16 having apertures 17 formed therein for the [192] reception of the segmental setting members 12. That is on Page 1, Line 10.

He has a retaining pin, which he describes as follows in Line 45:

“The bolt member 3 is split longitudinally from its lower end to allow for expansion and

(Testimony of John D. Hackstaff.)

provided with an enlarged head 8 having shoulders 9 adapted to engage the surface of the plate 7 surrounding the aperture 5. The bolt member is provided at its other end with a flange 10 adapted to engage a spring 11.”

He provides a spring element 11.

In the second column, Line 7:

“Between the flange 10 and base 14 is inserted a spring 11 tending to draw the head 8 within the case 13. At its upper portion the case 13 is provided with a cover 16 having apertures 17 formed therein for the reception of the segmental setting members 12.”

These segmental members 12 are the upward projections of the top of the retaining pin, and in the Rogers device are the tool-engaging means, as best illustrated on Figure 3. Rogers’ device has a spreader. Reading in Line 15:

“The cover 16 is also centrally provided with an inwardly extending pin 19 inserted into the axial passage in the bolt member 3.”

This device has the four elements of the basic combination: [193] a housing, a slidable retaining pin with enlarged heads projected down through a hole in the bottom of the housing, a spreader to spread the pins when they are retracted toward the housing so that they will engage the perimeter of the rivet hole, and a spring between the bottom of the housing and the top of the retaining pin, tending to withdraw the pin back into the housing. [194]

(Testimony of John D. Hackstaff.)

It also has a cover 16 in the housing which performs two functions: One, it carries and positions the spreader 19; and, second, it prevents the ejection of the retaining pin which is below it from the housing in case the barbs on the retaining pin fail, for some reason, to engage either the under surface of the work and also the under surface of the housing bottom.

It has the exact safety feature as shown by Webb, though the particular forms of the elements are dissimilar. They, however, are located in the same relative positions in the entire device, perform exactly the same functions as the flanges 15 and 20 in Webb and 16 and 33 in Wallace patent '408.

The Rogers illustrates a retaining clamp which has the added safety feature first illustrated in the Webb patent, and which illustration in the Webb patent is practically identical with the safety feature illustrated in the Wallace patent '408.

Q. Have you finished your description of this patent? A. Yes.

Mr. F. W. Lyon: I believe that is all, your Honor, at this time.

The Court: Cross-examine.

Mr. Mason: Did I understand that you wanted to put Mr. Finkle on before I cross-examined?

Mr. F. W. Lyon: Yes; because there might be certain things he wanted to cross-examine Mr. Hackstaff about after he has seen certain demonstrations of how these devices are put together. I would like to call Mr. Finkle out of order just for that purpose.

The Court: All right. We will take a recess until 2:00 o'clock.

(Whereupon a recess was taken until 2:00 o'clock p.m. of the same day, Friday, January 24, 1947.) [196]

Los Angeles, California, Friday, January 24, 1947
2:00 P.M.

The Court: Mr. Cross, call the calendar.

The Clerk: Yes, your Honor.

(Case called by the clerk.)

Mr. Mason: Ready for the plaintiffs.

Mr. F. W. Lyon: Ready, your Honor.

The Court: Proceed.

Mr. F. W. Lyon: Mr. Finkle, will you take the stand, please?

Your Honor, I got a continuance in this case once before because Mr. Donald Finkle had broken his leg, and we said that he was a necessary witness. Now, the man is still ill, and I am unable to bring him in, but I think possibly we can get by without him. I have called his son in his place.

GEORGE H. FINKLE

called as a witness by and on behalf of the defendant, being first duly sworn, was examined and testified as follows:

The Clerk: Your full name, please?

The Witness: George H. Finkle.

(Testimony of George H. Finkle.)

Direct Examination

By Mr. F. W. Lyon:

Q. Mr. Finkle, what is your connection with the defendant in this case, Donald Finkle, and with the Wedglock Company? [197]

A. I am the vice-president of the Wedglock Company and I manage the business.

Q. While your father was operating the business as an individual, what were your duties?

A. I was manager. That was prior to 1942. From April, 1941, until, I believe it was May of 1942 I managed the business for him.

Q. Then what?

A. Then the partnership of myself and Ralph Head was formed, and that operated until July 13, 1945.

Q. You are familiar with all of the clamps manufactured during the time you have testified to?

A. Yes.

Q. And do you know how they are assembled?

A. Yes.

Q. Could you demonstrate to the court how a clamp such as Exhibit G is assembled?

A. Yes. I can give the preliminary assembly of it. That is——

Q. Well, you can show us how it is done?

A. Yes.

Mr. Mason: If your Honor please, Exhibit G is not charged to infringe in this case, and I don't see the materiality of this.

(Testimony of George H. Finkle.)

Mr. F. W. Lyon: Your Honor, the only difference claimed [198] that is made by the plaintiffs is that Exhibit G differs from Exhibit 11 only in that it has a solid bottom with no end cover of any kind, and they have made the contention that the main basis of novelty in their patent is in the method of assembly, that their method is so much cheaper, quicker, and everything. We want to show exactly how the old solid bottom was assembled and how the latest type is assembled.

The Court: There was testimony of that kind.

Mr. Mason: Do I understand from this line of testimony that you are going to produce here, that you are attacking the utility of the patent in suit?

Mr. F. W. Lyon: No, I am not attacking the utility of the patent in suit.

Mr. Mason: But you are using a cap, and that is the only thing we charge, and in that form of clamp. That is the only thing we charge to infringe. Just to show how many other ways you might do it, unless you are doing it, well, I don't see the materiality of that.

Mr. F. W. Lyon: There is no statement in the patent in any place as to the method of assembling it.

Mr. Mason: This is not a method patent. It is a structure which enables you to assemble it in an economical manner.

Mr. F. W. Lyon: If the Court please, I believe that the plaintiffs have attempted to build up the patent and show that it has a commercial use by the fact that it can be assembled more cheaply.

(Testimony of George H. Finkle.)

The Court: In about a third of the time, I think, was the testimony.

Mr. Mason: Your Honor, we are speaking of clamps in issue here. These are not in issue at all.

Mr. F. W. Lyon: We can put them in issue.

Mr. Mason: I don't want them in issue. We are not charging that this exhibit——

The Court: Exhibit G?

Mr. Mason: ——G infringes, nor are we charging that Exhibit 10 infringes. Now, to show how the plaintiffs might assume to assemble that clamp, I don't see how that is going to be helpful, and it is an attack on the utility of something you have copied.

The Court: Mr. Mason, I will ask you this question, then: As to this point that was made here by the plaintiffs with reference to the time consumed in assembling the device, did that include the assembling of this part of the device?

Mr. Mason: That included that part.

The Court: In computing the time?

Mr. Mason: Yes.

The Court: Then for that purpose I will permit it to be received.

Mr. F. W. Lyon: Not only for that purpose, your Honor, but they have introduced evidence here, in Exhibit 22 in [200] particular, and we are certainly entitled to show that Exhibit 22 is entirely false and the statements of Mr. Livingston are entirely false. [201]

(Testimony of George H. Finkle.)

They introduced that evidence. I am only rebutting it.

Mr. Mason: No matter what this witness might testify, it would not show that is false. Mr. Livingston testified as to the plaintiffs' procedure. Now, whether the defendant might follow that same procedure would not render Mr. Livingston's testimony false.

The Court: I will hear the testimony.

Q. (By Mr. F. W. Lyon): All right. Will you describe what you have there in front of you, Mr. Finkle?

A. I have here what we call a stringing jig which is used in the first operation of assembling the solid body fastener. We have been referring to these as "spreaders", haven't we?

Q. No. A. Not spreaders, but the——

Q. Pins.

A. ——pins. I take the two pins and insert them in the jig which holds them firmly in place. They are now locked in place. And I take the spreader and insert it—I don't know that I can do as well as the girls but I will try—then I bring the body over, pull the assembly out, and the T is in place.

Q. From there on all you do is add the spring under pressure?

Mr. Mason: Let us complete the clamp. [202]

A. Well, I can't do that without bringing another unit in here, and that is to compress it and

(Testimony of George H. Finkle.)

insert the—we have this unit here with the spring on it, we bring it this way, we press it down and insert a cap over there and insert a spreader over the two ends. It has come apart, though. The two ends are spread out and then interlock in place.

Q. (By Mr. F. W. Lyon): In that manner of positioning the spreader and the wires through the body, does the length of the body make any difference in the operation or in the length of time that is required to assemble it? A. No.

Q. If the body was six or seven inches long, it would not make it any more difficult?

A. No. We would probably make the jig a slight difference, but it would be exactly the same operation.

Q. Well, the jig would just have to be made longer? A. That is right.

Mr. F. W. Lyon: I think that is all that I need of this witness at this time, your Honor. He has other evidence, too. We want to go on with this cross-examination of Mr. Hackstaff if I may recall him later.

Mr. Mason: Are you going to recall him later?

Mr. F. W. Lyon: Yes.

Mr. Mason: I will wait, then, for cross-examination. [203]

Mr. F. W. Lyon: Step down, Mr. Finkle.

JOHN D. HACKSTAFF

recalled

Mr. Mason: Are you through with Mr. Hackstaff?

Mr. F. W. Lyon: I would just like to ask him a few more questions.

Direct Examination

(Resumed)

By Mr. F. W. Lyon:

Q. Mr. Hackstaff, have you colored a drawing from the Wallace '408 patent, Exhibit H-2, and the Wallace '929 patent, Exhibit H-11, in the same manner as you did the previously colored drawings?

A. I have colored the Wallace '929 patent and the Wallace '408 patent in the same way; that is, I have colored the housing and the end wall thereof in each case blue.

Q. Green you mean?

A. Green. The retaining pin and its head, red; the spreader, yellow; the spring, blue.

I have also colored the end cap of the '929 patent, element 9, and the end cap of the '408 patent, element 11, brown.

Mr. F. W. Lyon: All right; that is all I wanted to direct your attention to. [204]

Cross-Examination

By Mr. Mason:

Q. Mr. Hackstaff, will you examine Plaintiffs' Exhibits 11-A and 12-A and state whether it is not true that in each of those exhibits, in addition to

(Testimony of John D. Hackstaff.)

the end cap, you have two washers, one beneath the spreader and one above the spreader, which washers are denoted Wa and Wb in Exhibits 17 and 18?

A. These two exhibits have——

The Court: Now, refer to these two exhibits by numbers.

A. These two exhibits, 11-A and 12-A, have two washers, one above and one below the cross-arm of the T spreader, which are free within the body of the housing and are not connected in any way with the shell of the housing.

Q. (By Mr. Mason): Now, why did you leave those out of Exhibit L? I believe that is Exhibit L.

A. One of the washers is shown in Exhibit L, in each case, the yellow at the bottom.

Q. That would correspond to the bottom washer, would it? A. Yes.

Q. You do not have anything to correspond to the top washer?

A. Not on this drawing. This drawing was made from a device which, instead of using a T-shaped spreader, uses a spreader which is cross-shaped, so that the cross, upper [205] cross member, or the upper member of the cross projects upward into the center of the spring and centers the spring on the spreader. Sometimes the devices which I used, from which I made these drawings, did not have another T.

Q. You have not made your drawings, then, to comply strictly with the stipulated structure as illustrated by Exhibits 17 and 18?

(Testimony of John D. Hackstaff.)

Mr. F. W. Lyon: I object to that, your Honor. The stipulation that I entered into was that the drawings 11 and 12 are one type of the devices made by the defendants, but that we make them with washers above, below, sometimes only upper washers, sometimes just a lower washer, and sometimes no washers.

Mr. Mason: I do not remember of the other mentioned in the stipulation.

The Court: Well, you can clear it up, gentlemen.

Mr. F. W. Lyon: Because I have personally pulled a lot of these apart and have found them made all ways.

Mr. Mason: Well, isn't it true—I am asking counsel here—isn't it true that the regular structure is intended to have two washers?

Mr. F. W. Lyon: No; it is not. That is just what I am trying to say. Are you charging the infringement only of the one with two washers?

Mr. Mason: No. I claim it does not make any difference [206] whether you have one or two. But the expert here has made certain statements, where he has called a single washer as one element, and it may make a difference if you had two washers.

Mr. F. W. Lyon: We make them with both, two washers, one washer up above, sometimes one below, sometimes no washers. And I believe all types are before the court.

The Court: That clear that.

Q. (By Mr. Mason): I believe you have testified, Mr. Hackstaff, that in these sheet metal clamps

(Testimony of John D. Hackstaff.)

it is important that the retaining pins which project into the work sheet holes fill the holes?

A. The retaining pin, and in cooperation with the sections of the——

Q. Spreader.

A. ——of the spreader fill the holes, as shown by Rocroy and DeMooy.

Q. That is important in those clamps, isn't it?

A. Yes, sir.

Q. In other words, if they did not have that spreader portion between those pins, they would spring together?

A. Yes, sir.

Q. As I have been able to follow your testimony this morning, you have followed a line of reasoning which has enabled you to arrive at the conclusion that the defendant's [207] clamps, Exhibits 11 and 12, do not have an end cap, is that correct?

A. Just what do you mean by "an end cap"?

Q. A cap on the end of the spreader, on the end of the body.

A. The Exhibits 11 and 12 have an end bottom or body wall which is composed of a cup which is rolled into the end of the housing. When the cup is rolled into the end of the housing, the cup has—or, if you please to call it "cap"—becomes integral with the cylindrical portion of the housing and we get exactly the same kind of a member which is shown in the housing of DeMooy and in the housing of the patent '787, which housing is composed of a round body with an integral end wall 12.

(Testimony of John D. Hackstaff.)

Whatever you want to call this particular enclosure member, it is an integral part of the body after the clamp is assembled.

Q. Do you mean that it is integral with it or it is attached to it?

A. What is your definition of "integral"?

The Court: No, no. The witness cannot ask the counsel questions. Clear it up if the witness does not understand it, Mr. Mason.

Q. (By Mr. Mason): In other words, as distinguished from being cast as a part of the body or made as a part of the same casting or piece of metal, the cap 11 in Exhibit 17 [208] and the cap 27 in Exhibit 18 are attached to the body by being crimped around its peripheral edge?

A. The structure in the two exhibits, instead of using a casting in which the bottom of the casting is cast integrally with the shell, in one operation, is composed of two pieces, a shell and a bottom, which are then rolled and fabricated together. When the shell is completed it performs the functions of a single integral cup-shaped body.

Q. Then you mean that it performs the function, after it is assembled, being a unitary body; but, to begin with, it is two pieces and they are attached together, is that correct?

A. In a body, yes; performs exactly the same function as if it had been made in one piece.

Q. In patent '787 this cap 27 would, by your same definition, be an integral part of the body, wouldn't it?

A. Yes.

(Testimony of John D. Hackstaff.)

Q. I am referring to the cap 27?

A. Yes; when it was applied. Its functions, however, will be entirely different from the other part of the bottom of the body which is known in the patent as the bottom wall 12. This cap 27 is superimposed below the bottom wall 12.

Q. Cap 27 in Exhibit 16 functions to hold the cross-arm of the spreader 25 against outward longitudinal movement with relation to the body, doesn't it? [209]

A. The use of that cap to hold the cross-arm in the slots in the body is the essence of—is described in the Wallace patent.

Mr. Mason: Can you answer my question yes or no? Will you read the question, please?

(Question read by the reporter.)

A. Yes, sir.

Q. Your answer is "yes"? A. Yes.

Q. Isn't that the function of the cap 11 in Exhibit 17?

A. That is one of the functions of the cap 11 in Exhibit 17.

Q. And the cap 27?

A. Is one of the functions of the end wall of the Exhibit——

Q. That is 17. A. ——17.

Q. And one of the functions of the cap 27 in Exhibit 18?

A. One of the functions; yes, sir. [210]

(Testimony of John D. Hackstaff.)

Q. Now, in Exhibit 17 the washer Wa serves as a bearing member for the end of the spring 32, doesn't it? A. No, sir.

Q. What does it do?

A. It is a washer in position between the spring and the end wall, simply as a washer. The force of the spring is transmitted through this washer, which is loose in the body. The only way the force of the spring can be resisted by the end wall of the body is by the end wall of the body. The elimination of that washer would not change the operation of the device in any way, shape or form.

Q. The spring does bear at its lower end against washer Wa, does it not? A. Yes, sir.

Q. And the same is true in Exhibit 18, the lower end of this spring bears against washer Wa?

A. Yes, sir. Both washers are entirely independent of the body.

Mr. F. W. Lyon: I believe, Mr. Mason, we had an earlier stipulation that Exhibits 17 and 18 and 11 and 12, that we need not question as to both of them individually, because they are the same.

Mr. Mason: Thank you for reminding me.

Mr. F. W. Lyon: So we do not need to duplicate the testimony. [211]

Mr. Mason: Only in the respect——

Mr. F. W. Lyon: Of the cap and the plunger.

Mr. Mason: One of them is not charged to infringe Patent '787.

Mr. F. W. Lyon: No, '408. Both are charged to infringe Patent '787.

(Testimony of John D. Hackstaff.)

Mr. Mason: I mean '408.

Q. (By Mr. Mason): Which of the patents, Mr. Hackstaff, which you have discussed, do you considered to be the most pertinent to the Patent '787, Claim 11?

A. The second DeMooy patent, '188, which is illustrated in Exhibit J.

Q. That is what you consider the most pertinent art?
A. Yes, sir.

Mr. F. W. Lyon: That is Exhibit H-7, isn't it?

The Witness: H-7, in which the colored drawing has been introduced as Exhibit J.

Q. (By Mr. Mason): I believe you testified this morning that in these sheet metal clamps it is important that the work-engaging surface, the sheet-engaging surface of the clamp be smooth, otherwise it will mar the sheet; isn't that correct?

A. Some people believe that it should be smooth so as not to mar the sheet. Webb provides a rubber washer for that purpose. Wallace says the cap 27 has an outward curved [212] work-engaging surface 27a so that as the device is held against the work only a minimum contact surface is presented whereby to minimize the chance of marring the surface of the work.

Q. I asked you what your view was. Isn't it important that the sheet-engaging surface of the clamp be smooth, as distinguished from rough?

A. Yes, with soft metal sheets; with hard metal sheets it is immaterial.

(Testimony of John D. Hackstaff.)

Q. For instance, in working on aircraft sheets the metal of the clamp is harder than the metal of the sheets? A. Yes.

Q. So that it would be important to have a smooth surface, is that correct? A. Yes.

Q. Now, in DeMooy '188, in order to hold his spreaders on the body DeMooy cuts a groove into the integral end wall of the body, and he mounts his spreader in that groove. Then to hold the spreader in the groove he peens over the edges of the groove or provides ears at the end of the groove which he bends over the cross arm of the spreader, isn't that correct? A. Yes, sir.

Q. The groove and the spreader are thus exposed to the work sheet? A. Yes, sir.

Q. Now, in De Mooy '188 he would necessarily have to [213] have a groove in order to mount his spreader, wouldn't he,

A. That is the way he describes his apparatus exactly; the same way that Wallace describes his apparatus, having a groove in the slot, in which he, as I recall from the file wrapper in evidence, represented to the Patent Office that it was a very important feature of his invention.

Mr. Mason: I move to strike the latter part of the answer as not being responsive, that is, the part as to what Wallace says.

The Court: Stricken as having been volunteered.

Q. (By Mr. Mason): Now, isn't it apparent, Mr. Hackstaff, that by providing that groove in

(Testimony of John D. Hackstaff.)

the outer surface of the end of the body and providing that type of mounting of the spreader, De Mooy is trying to arrive at a structure by which he could insert his pins through one end of the body and apply the spreader between the pins from the other end of the body?

A. In De Mooy's structure it is essential that the pins be inserted from within the body and through the end wall from its upper side. De Mooy then positions his spreader on the bottom side of his end wall, after the pins have been pushed through the end wall.

Q. Did you complete your answer?

A. Does that answer your question?

Q. Then isn't it apparent to you as an engineer that what he was seeking to do was to provide a structure by which [214] he could mount his spreader from the outer end of the body?

A. From below the bottom of the body, yes, sir.

Q. Now, you know that De Mooy is an employee of the Cleveland Automatic Tool Company?

A. I have heard so.

Q. That is the company that manufactured the Cleco clamp, Exhibit 13?

A. Yes.

Q. It would appear, then, that De Mooy was trying to improve the two-prong type of clamp, as distinguished from the single-prong type of clamp as shown by the Cleco clamp, Exhibit 13?

Mr. F. W. Lyon: Your Honor, counsel is asking the witness to suppose something that is plainly hearsay. To begin with, it is based on nothing but what he has heard. He said something about Mr.

(Testimony of John D. Hackstaff.)

De Mooy, and he is asking now about a supposition of something that might be in somebody else's mind.

The Court: But this is cross-examination, and in cross-examination counsel can assume any problem that they wish.

Mr. F. W. Lyon: He could assume it, but he is asking him a question, did this man have that in his mind. How he could answer such a question, I wouldn't know.

Mr. Mason: I didn't ask him that question.

The Court: I assume that he could properly be asked what [215] the purpose of this was, to contrive it in this manner, if it was to minimize the work, or if it was to make it of greater facility in operation. I assume that is correct.

Mr. F. W. Lyon: If that question has been asked, I would have no objection, but his question was what was Mr. De Mooy thinking about.

The Court: It is clear to the court that that was what was meant. When you ask if that way the phraseology may not have been accurate. Can you answer the question, Mr. Witness?

The Witness: The De Mooy patent on its face in its specifications discloses a bifurcated pin clamp of the same general character as Rocroy's, and specifically positions his spreader on the face of the bottom of the body in a slot that is cut in the bottom of the body.

Mr. Mason: I don't think you have replied to my question. Would you kindly read the question?

(The question referred to was read by the reporter.)

(Testimony of John D. Hackstaff.)

The Witness: Mr. De Mooy shows an improvement in the two-pronged type of clamp of Rocroy.

Q. (By Mr. Mason): You know, do you not, Mr. Hackstaff, that this clamp made by De Mooy Patent '188 never went into commercial use?

A. I have no knowledge on the subject whatsoever.

Q. I show you a sub-assembly, Exhibit E, and ask you if that could be mounted in the device shown by De Mooy '188. [216]

A. In what part of the device '188?

Q. Whatever it is intended to be in the clamp.

A. No. It has an entirely different position of the spreader. This Exhibit F is a sub-assembly of one of the defendant's clamps. The cup is the bottom end wall of the housing. The spreader in Exhibit F is positioned so that it will be inside of the housing on the top face of the bottom of the housing. De Mooy's patent calls for the spreader to be positioned in slots on the outside of the bottom of the housing.

Mr. F. W. Lyon: Just a minute. For correction, the exhibit you have just been testifying about is Exhibit E and not F, isn't it?

The Witness: I guess it is.

The Clerk: That is E.

Mr. F. W. Lyon: That is E and not F.

Q. (By Mr. Mason): Have you examined the file history of Patent '787? A. Yes, sir.

(Testimony of John D. Hackstaff.)

Q. Now, isn't it true that the Patent Office cited and considered in that file wrapper the De Mooy Patent 2,269,188, the A. T. S. Patent 413,403, and the Rocroy Patent 443,683?

A. I believe that is correct, and also the Verdon Roe patent.

Q. It considered other patents also, but I mean it did [217] consider those patents you have discussed here? A. Yes, sir.

Q. Now, in discussing the Rocroy Patent 443,683, which is Exhibit H-4, I believe you testified that the patent was very vague as to how the spreader was mounted. At least you can tell, however, that the patent does not show an end cap over the lower end of the body; isn't that true?

A. Yes. There is no separate element shown as an end cap, nor specified as an end wall.

Q. In none of the patents that you have discussed have you found any one which shows a cap over the outer end of the body, with a cross arm of a spreader mounted on the inner surface of the cap and projecting outwardly through a hole in the cap between two reciprocating clamping pins or retaining pins, have you?

A. That particular construction is shown in the Wallace Patent '787, yes, sir.

Q. In any other patents you have discussed you did not find that, however?

A. No, not that particular method of holding in the spreader, except that if you turn to the Blanc patent you will find that the spreader and a washer

(Testimony of John D. Hackstaff.)

is dropped into the housing and rests on top of the bottom of the housing. If Blanc should have made his housing in two parts, and you called the bottom of it, because it was made in two parts, a [218] cap, under those circumstances, why, you would have found the Blanc spreader resting on a cap and sticking out through the hole in the bottom of the cap, which cap in that instance would have been the bottom of the housing.

Q. However, you did not find that Blanc showed a separate cap, did you? A. No, but——

Q. Now, will you point out to me what you call the spreader in Blanc?

A. I call the spreader in Blanc, “Referring to the illustrative structure, 10 represents a pin or elongated element which has the upper end thereof threaded,”—I am wrong there.

The Court: Strike it out.

The Witness: Strike that out, please. (Continuing):

“In the counterbore 16, there is located”—this is Page 1, Column 2, Line 22—“there is located, in engagement with the bottom wall thereof, a washer 18 having a radially disposed slot 19 extending somewhat beyond the center of the washer and of a width substantially equal to the normal diameter of the pin 10. The washer 18 is also formed with a stem 20 depending therefrom and extending through the bore 17 of the cap 15.”

In this case Blanc calls the end of his body a cap.

Q. (By Mr. Mason): It is cast as an integral part of the [219] body?

(Testimony of John D. Hackstaff.)

A. I don't know how he formed the cap—how he formed the body.

Q. Does it show as a separable element?

A. Does he show his body and his end wall as a unitary piece or an assembly of two pieces which are joined together to form a unitary element?

Q. That is what I am asking you.

A. He shows it as one.

Q. Now, in this Blanc patent he uses merely a single retaining pin; isn't that true?

A. Yes, sir.

Q. And the element 20 merely served to fill up a part of the hole along with the pin. It doesn't spread two pins apart?

A. It springs the pin apart so that it performs exactly the same function with the single pin that the T-shaped spreader of Rocroy—of De Mooy's second does with the two pins.

Q. In Rocroy the spreader spreads two pins apart, being between it, doesn't it?

A. It holds—in the Rocroy device the spreader and the two parts of the pin are held normally so that they fill the rivet hole. When the pin is drawn close to the sheet, the spreader prevents the points of the pins being sprung or [220] moved together so that they can enter or retract through the rivet hole. The pin or stem 20 of Blanc performs exactly the same purpose. It, with the portion of the pin, fills up the rivet hole, and it prevents the head or holds the single rod in such a position that the enlarged head of it engages the side of the rivet. There

(Testimony of John D. Hackstaff.)

is no difference whatever in the function or manner of operation, whether it is a pin in one rod, as shown by Blanc, or a spreader and bifurcated pins, or going back to A. T. S., probably having three or four resilient pins. They all worked the same way.

Q. You say it makes no difference whatsoever in function. Have you ever applied one of the Cleco clamps made under the Blanc patent in comparison with applying a clamp such as Exhibit 12?

A. When you use——

Q. Fill one in these holes.

The Court: Now, what exhibits have you?

Mr. Mason: He has Exhibit 13, the Cleco clamp, and he is operating it with the gun, Exhibit 15, to apply the retaining pin into the hole of Exhibit 14.

The Witness: When you project the pin, the retaining pin of the Blanc, after you insert it in the hole you have to move the clamp sidewise a little in order to enter the pin in the hole. The Blanc device does not have the direct vertical axial alignment of the pin with the rivet hole that is [221] shown in the Rocroy device and in the A. T. S. device. With the Blanc device, I am told that in operation there was a slight S motion in putting it in and a slight S motion in pulling it out.

Q. And after it is in position, it only clamps from one side of the hole?

A. After it is in position, it only clamps from one side of the hole.

Q. Whereas in a two-prong clamp, such as Exhibit 12, it clamps on two sides of the hole and gives a balanced clamping action?

(Testimony of John D. Hackstaff.)

A. And if you have a four-sided clamp, like in A. T. S., it clamps on four sides of the hole.

Q. And in Blanc, what you call a spreader does not spread apart two pins which go into the hole?

A. In the Blanc—in the Rocroy——

Q. I am speaking of the Blanc patent now.

A. The Blanc, having only one pin, can't spread two pins apart.

Q. Then the function of the Blanc patent is not identical with the clamps here involved, that is, plaintiffs' clamps and defendant's clamps, Exhibits 11 and 12?

A. The function is identical.

Q. Didn't you just testify that one provided a one-sided clamping action and the other provided a two-sided [222] clamping action and one you had to weave into the hole, and the other you could insert actually into the hole?

A. By "function" I mean what the device accomplishes, and how it accomplishes it. The function of all of these devices is to provide an apparatus or device in which the retaining pin, when it is projected from a distance beyond the bottom of the housing, can be entered into the rivet hole, but when the retaining pin is retracted close to the housing it cannot be pulled out of the rivet hole. Each one of the patents that we have discussed has this primary function and characteristic of the retaining pin or pins.

The Court: You don't mean they can't be retracted, because they later come along and rivet in those places, don't they?

(Testimony of John D. Hackstaff.)

The Witness: They take them out, your Honor. They use the gun.

The Court: To insert it?

The Witness: They use the gun to insert it. They also use the gun to remove it. When they use the gun——

The Court: I was going to say I thought you said it stayed in there.

The Witness: It does. [223]

The Court: But they remove it.

The Witness: It will now enter the hole.

The Court: That is right.

The Witness: It has now. You see, it rests on there, sir.

Mr. F. W. Lyon: I am just handing the witness a couple of plates similar.

The Witness: Too small.

Mr. F. W. Lyon: Well, use these.

Mr. Mason: Use this hole. One of those holes fits it. I don't know. The next one, I guess. Try the second one.

The Witness: It has now entered.

The Court: That is right.

Mr. F. W. Lyon: Now, the next one.

The Witness: Look out, sir. This is liable to shoot if it gets loose out of here from this gun.

The Court: It will be all right if it hits one of the attorneys and does not hit me.

Mr. F. W. Lyon: I would warn your Honor to be very careful in handling those, because they have quite a lot of force on those springs.

(Testimony of John D. Hackstaff.)

The Witness: This particular clamp will not go——

The Court: You are right in the line of it there.

Mr. F. W. Lyon: No; they come your direction.

The Witness: You enter it.

The Court: Yes.

The Witness: Now, when you let this come out it is caught.

The Court: That is right.

The Witness: Now, when you want to take it out, you reverse the operation; you push it forward.

The Court: That is right; loosening it.

The Witness: Loosening it.

The Court: Yes, certainly.

The Witness: It only goes in and comes out when the pin is extended a considerable distance beyond the base of the housing.

The Court: That is all right.

The Witness: When it is close to the base of the housing, it cannot either go in or go out. That is the function of the device of the retaining pin in the A-B-C-D combination.

Q. (By Mr. Mason): Now, you refer to the A-B-C-D combination. Do you want us to believe from that statement that all of these patents, H-3, H-4, H-5, H-6, and H-7, show the same structure?

A. H-3——

Q. That is the A. T. S., the Rocroy, the Blanc, and [225] the two DeMooy patents.

A. Do they show the same structures? Each of them has structures which have four cooperating

(Testimony of John D. Hackstaff.)

elements, and they have specifically designed elements which perform the same function in the combination in each case. If the A. T. S. people had gotten their claim, which they obtained, their claim 1, patented in the United States, and if the patent was good, they would have read upon every one of these structures, because each one of the structures would have contained the elements described in that claim, physical elements described in that claim.

Q. And the subsequent patents contained improvements over A. T. S., is that correct?

A. They are all improvement patents over the A. T. S.; yes, sir; and therefore must be limited to the specific improvements which they describe.

Q. And you would classify the Wallace patents '787 and '408 as improvement patents, wouldn't you?

A. Yes, sir; they are improvement patents. The——

The Court: Now, you have answered the question. We have a great deal of repetition here, gentlemen, on both sides. Go ahead.

Q. (By Mr. Mason): Now I will ask you to refer to drawing, Exhibit 17, which is a drawing of Exhibit 11, and ask you if you can conceive of any way in which that precise [226] structure illustrated there could be assembled without having a cap which could be applied to the end of the body after the interior construction had been inserted in the body?

The Court: Now, repeat the question, Mr. Reporter.

(Testimony of John D. Hackstaff.)

Mr. Mason: Will you read it, please?

(Question read by the reporter.)

Mr. Mason: Is that clear?

The Witness: Will you read the question, please?

(Question again read by the reporter.)

A. Yes; I can.

Q. Will you tell us just how you would do it?

A. I would assemble the—I would, first, in each one of these devices——

Q. Now, keep your answer to Exhibit 11 or Exhibit 17 which is the drawing.

Mr. F. W. Lyon: Your Honor, that imputed that the question be either reworded or corrected. He has defined the structure and then asked if he could make that structure any other way and still have the parts in the structure.

Mr. Mason: That is not the question. Read the question again.

Mr. F. W. Lyon: He said to leave no part out, and still construct the device with the part left out.

The Court: No; I do not think so. Repeat the question.

(Question again read by the reporter.) [227]

Mr. F. W. Lyon: Your Honor, the structure, he says, already has a cap on it; and he says: How can you make it without the cap on it and still have what is shown here.

(Testimony of John D. Hackstaff.)

The Court: I understand what he means, although maybe the witness does not. If he does not, he can ask.

Mr. Mason: Did you understand it?

The Witness: I understand it perfectly.

The Court: I understand it.

A. Yes; I would take that body, and if I was to manufacture it, I would leave off this flange right here and after I had assembled all the guts of the apparatus in the body and this permanent end wall, I would roll in or mill in the top end of the body so as to hold the apparatus in place.

Q. (By Mr. Mason): Now, you stated the final step. How would you go about assembling this part before you put in this element 17?

A. On the two pins I would assemble the spring, the washers, the clamp, and, with the proper jig, insert the pins down through the hole, drop in the element 16 on top and turn in the top flanges; just exactly as Webb proposes to construct his structure which has a similar thimble on top.

Q. You know, do you not, that you cannot insert these heads of the pins and the spreader through the opening in the [228] end wall?

The Court: In the bottom.

Mr. Mason: In the bottom, at the same time, do you not?

A. I know that you can't insert the spreader and the heads of the pins at the same time, therefore, I would hold back the heads of the—project the pins in advance of the spreader.

(Testimony of John D. Hackstaff.)

Q. How would you hold the spring compressed, bearing in mind that that is about a thirty-pound spring?

A. I think there would be no trouble in making a jig that would do that, sir.

Q. You would have to hold it compressed while you were inserting it; you could not get the jig into the body, could you?

A. Yes; I can conceive of such a thing being done.

Q. Well, what kind of a jig would you make to do that? Can you explain how it would be done?

A. No, sir; I can't at this moment without some thought of it. That is a tool-makers job which is very simple compared with the jobs that tool-makers are doing all the time. I am in the same boat as——

The Court: Now, ask the next question.

Q. (By Mr. Mason): These pins are made of very hard metal, aren't they?

A. Yes, sir—no. [229]

Q. Gamma wire?

A. They are made of elastic metal; yes, sir.

Q. You have spoken of bending these ends down after you apply it to the body? A. Yes, sir.

Q. How would you hold the pins while you were bending that down?

A. I don't follow you, sir.

Q. Well, in order to bend these ends of the pins over—and I will refer to Exhibit 11-A; I believe you can see it in 12-A better—would you not have to hold the remainder of these pins 20 very firmly

(Testimony of John D. Hackstaff.)

by some means in order to bend over this gamma wire, as shown at the top end where it is bent over the washer?

A. If I were to—a method by which the Exhibit 11-A can be assembled—and there are various ways of assembling, depending entirely upon the ideas of the manufacturer—would be as the final step in your operation, the pushing, the spinning in of the top member of the housing.

Q. I understand that.

A. I would assemble the pins, the washers on a spreader, on a jig similar to the one which I saw demonstrated this morning, insert the pins and the washers through the end of the bottom end of the housing, put it in a jig, drop the spring on, compress the spring against the bottom of the [230] housing to form the wires, turn the wires over the end of the top, drop on the tool-engaging member and lock it in by turning in the top edge of the housing.

Q. In order to insert that from the bottom end, you state, however, you would have to have a cap to close that after you had completed it, wouldn't you?

A. I did not say to put it in from the bottom end. I said that I would put it in from the top end exactly the same way that you have got to assemble '787, the only difference being that I would have to slip on the spreader so it would be left inside of the housing, instead of slipping it on the outside of the housing as '787 describes.

(Testimony of John D. Hackstaff.)

Q. No matter how you would proceed, however, you would have to bend over the ends, bend the top ends of the retaining pins over this washer while the retaining pins were mounted in the housing, wouldn't you?

A. Yes. Yes, sir. Another way in which that device can be assembled, I would make the housing in two parts, saw it in between the two shoulders.

Q. I am asking you to confine your answer to this precise structure.

A. And then join the two halves.

Q. In your answers this morning and in discussing the patents in suit, '787 and '408, you confined your description to what is shown in the drawings, rather than what is set [231] forth in the claims, did you not? A. No, sir. In the claims?

Q. Yes.

A. What was set forth in the drawings and in the specifications; yes, sir.

Q. But not in the claims; you did not go into the claims?

A. Not in discussing it this morning, excepting when I discussed claim 2 of '408.

Q. As a patent expert, you realize, do you not, that in preparing a patent the purpose in showing a drawing is to show one way of carrying out the invention; isn't that true?

A. Yes; within certain limitations. You have got to show a practical way of turning it out.

Q. And in your specifications you describe what you have shown in your drawings?

A. Yes.

(Testimony of John D. Hackstaff.)

Q. Then in your claims you claim it so that you can define the scope within which you may depart from those details; isn't that true? A. No.

Mr. F. W. Lyon: If your Honor please, this is getting to be an argument with the witness over what the law is and not what any facts are.

Mr. Mason: He is a patent expert. I wanted to feel him out.

Mr. F. W. Lyon: That is a matter of law and not a matter of even opinion evidence or factual evidence.

The Court: I think it is going a little far, counsel. I am very liberal in cross-examination.

Mr. F. W. Lyon: I didn't hear the ruling.

The Court: Repeat it.

(Record read by the reporter.)

Q. (By Mr. Mason): Which of the patents that you have discussed here do you consider to be the most pertinent to patent '408?

A. The Wallace patent, H-11, '929, and the Webb patent, H-8, '634.

Q. You have examined the file history of that patent, haven't you, or file wrapper?

The Court: Which one? You mentioned two.

Mr. Mason: '408.

The Court: All right.

A. Yes, sir.

Q. Now I show you Wallace patent 2,292,498, which was cited also as a reference, and ask you if that is not, [233] insofar as the patent '408 is

(Testimony of John D. Hackstaff.)

concerned, in all material respects the same as the patent '929, Exhibit H-11?

A. No, I don't think this is the same as '929. If it is, how would it be patented?

Q. What are the differences?

A. In '929 the housing or the spreader is located in a space between the end of the housing and a cover cap. In this patent '498 there is another element added, which is a plastic of some sort, and a differentiation was made, as I recall the file wrapper, between the mounting of the spreader in the drawing shown in '408 and the way the spreader was mounted in patent '498, and the allowance was obtained on that representation.

Q. In this patent 2,292,498 the spreader is held against outward longitudinal escape from the body by means of a cap, is it not?

A. By means of a cover cap which is appended to the bottom of the housing and which cap does not in any way, shape and form co-act with the spring in the operation of the device.

Q. Well, does it co-act with the spring in '929?

A. No, sir; that is, the cover cap in '929 does not co-act with the spring, either.

Mr. Mason: I offer this patent into evidence as being the other patent cited by the Patent Office against the [234] application for patent '408.

The Court: Referring now to F. C. Wallace patent, August 11, 1942, No. 2,292,498, filed November 21, 1941?

Mr. Mason: That is right.

(Testimony of John D. Hackstaff.)

The Court: Into evidence.

The Clerk: Plaintiffs' Exhibit No. 23.

Q. (By Mr. Mason): Will you now refer to the Webb patent 2,256,634?

The Court: H-8.

Q. (By Mr. Mason): In that patent isn't it true that there is no spreader between the pins 12?

A. Sir?

The Court: Mr. Reporter, repeat the question.

(Question read by the reporter.)

A. Yes, sir; there is no spreader in between the pins 12.

Q. (By Mr. Mason): And if the flange 20 were to yield, allowing the barrel of the plunger 16 to escape, there would be nothing to prevent that entire inner assembly from flying out of the clamp, would there? A. Yes, sir.

Q. What?

A. When the pressure on 18 is released, the extension of the spring 29 would retract the pins so that the cams on either sides would co-act with the interior bore of the [235] plug 34 which has been inserted to close the end of the body, and it would cause the two prongs to separate and, in each case, they would contact against the bottom of 34.

Q. Now will you refer to Figure 6? The pins are in spread condition there, are they not?

A. Yes.

Q. By virtue of these cam elements 57 engaging the——

(Testimony of John D. Hackstaff.)

The Witness: Did I refer to Figure 6? I don't recall having done so.

Q. Well, I am asking you to refer to it now.

A. All right.

Q. In that view the pins are retracted, are they not, and spread apart? A. Yes.

Q. Now, isn't it apparent to you that this hole through the body—I believe it is designated 58 in Figure 6—is large enough to entirely pass those cam portions 57 and the outer ends of the pins?

A. If the hole in the bottom, the middle of the bottom of any of these clamps is made large enough, why, there is nothing to keep the enlarged pins from going through.

Q. I am asking you the question as to Figure 6 of the Webb patent.

A. Yes; Figure 6 shows the inner hole through the bottom of the housing sufficient size, seemingly, to let the [236] barbs pass up through them on that device.

Q. Well, does not that appear to be the same construction as in the other Figures? A. No.

Q. What difference do you find?

A. If you look on the page immediately above it on Figure 2, you will see that the pins within the block 34 filled the hole and, from the shape of the pins, the barbs project beyond, so that the pins would catch on the bottom of the block 34 when they were pushed out by the spring.

Q. I believe you testified that in these clamps it is essential that the retaining pins and spreader fill the hole of the sheet in order to operate positively?

(Testimony of John D. Hackstaff.)

A. Each of the patents states that this is a consideration to be desired.

Q. In the Webb patent that is not the case, is it?

A. I do not believe he mentions that fact to be the case.

Q. And in this Webb patent there was not involved any problem of how to mount a T-shaped spreader bar stationarily between and longitudinally of the reciprocal pins, was there?

A. No; it is not a spreader bar. However, the Webb does disclose that his body is a two-part body, in which he has a shell 11 which is closed by a bottom plug 34 which is [237] retained in position firmly with the body, where the body is rolled in in 25 and 26. In other words, he has a two-piece body which allows him to—that is his construction.

Q. In this British A. T. S. patent——

The Court: H-3, 413,403.

Mr. Mason: H-3?

The Court: H-3, 413,403.

Q. (By Mr. Mason): You do not find that he has any separate end cap on his body, do you?

A. No; he has not.

Q. Will you refer to Rogers, Exhibit H-9? In that patent the spreader element, which is a pin 19, is mounted in the top cover sheet 16; isn't that correct? A. Yes, sir.

Q. And if the flanged-over part of that sheet 16 were to become disengaged from the body, the spreader would come out from between the pins, wouldn't it?

(Testimony of John D. Hackstaff.)

A. If any flange which is made to hold anything fails, it will fail. If the flange 18 failed where it is crimped down over, the top end flange failed, the spring would then eject the top of the plate 16, the pin, and the retaining pins out of the housing if the heads of the pins did not prevent on their failure. The same thing would be true of the device manufactured by the defendant if the flange 16 failed or if 33 of the patent failed or if 15 of Webb failed. [238]

Q. If the flange 16 of Exhibit 17 were to fail, isn't it true that it would not in any way carry with it the spreader?

A. Are you assuming that the barbs have failed, first?

Q. No; I am not. You were mentioning the flange 17.

A. What is your assumption, Mr. Mason? I don't quite get it.

Mr. Mason: Would you read the question, and we will see if it is not clear.

(Question read by the reporter.)

A. Unless the barbs on the heads of the retaining pins failed or were not broken, what happened to the flange 16 would be immaterial; nothing would happen.

Q. In other words, there is no mechanical connection between the spreader in Exhibit 17 and the flange 16?

A. There is no difference between the flange 16 and the spreader and the end wall of the housing.

(Testimony of John D. Hackstaff.)

Q. In Rogers the spreader 19 is secured to the wall 16, which is the wall carrying the flange, is it not? A. Yes.

Q. And if that flange were to yield and the wall were to escape, the spreader would go with it?

A. If for any reason that wall was called upon, 16 was called upon, to withstanding the spring, and therefore the pins were ejected from the housing, the mandrel would be [239] carried along with the head just exactly the same way as the spreader would be carried on out through of the defendant's device if the retaining pins were ejected from the housing.

Q. In defendant's device, Exhibit 11, the drawing, Exhibit 17, there being no mechanical connection between the spreader and the flange, if the flange 16 were to yield, the pins would still be locked in the body, would they not, because the spreader would be between them? A. Yes.

Q. Now, that is not true of Rogers, is it?

A. No; that is not true of Rogers.

Mr. Mason: I think that is all, your Honor.

The Court: That is all. Any questions, Mr. Lyon?

Mr. F. W. Lyon: I have just one or two.

The Court: All right.

Mr. F. W. Lyon: May we have a recess?

The Court: How many witnesses after this?

Mr. F. W. Lyon: I have one, Mr. Finkle, here. I do not believe his testimony will take more than half an hour.

(Testimony of John D. Hackstaff.)

Mr. Mason: I may want to put Mr. Mattingly on, your Honor, for some rebuttal here.

The Court: We will take our afternoon recess.

(Short recess.) [240]

Redirect Examination

Q. (By Mr. F. W. Lyon): Mr. Hackstaff, I believe during the recess you made a drawing or aided in making it. What happened to it?

A. It is over there on the desk.

The Court: I thought we were going to start on another witness.

Mr. F. W. Lyon: I had just one redirect question here.

The Witness: Those two last drawings have not been entered into evidence.

Q. (By Mr. F. W. Lyon): This is a drawing of a fastener. Will you please tell us what that drawing shows.

A. This drawing shows a fastener which has a housing, with an end wall and a center hole large enough to pass the pin heads through when they are coacting with the spreader.

Q. In other words, in the spread position?

A. Yes, which has two pins, which has a spring, which has a top for tool engagement, and which has a washer with a hole only sufficient to pass the pin heads in their retracted position.

The Court: That is only cumulative, counsel. We have had every bit of that.

(Testimony of John D. Hackstaff.)

Mr. F. W. Lyon: Wait a minute, your Honor. I have a purpose in this.

Q. (By Mr. F. W. Lyon): There is a spreader in this [241] device. Will you indicate the spreader?

A. A spreader carried by the washer.

Q. Now, that device you have just referred to is exactly like Plaintiffs' Exhibit 11, other than the size of the hole in the end wall of the body, is it not?

A. Yes, sir.

Q. And that device could be assembled without the use of a cap?

A. Yes, sir.

Q. And you could assemble the same sub-assembly and put it together?

The Court: Now, let the witness answer, counsel. Repeat it the way he has started his question.

The Witness: This device could be sub-assembled on the washer in exactly the same manner in which Exhibit 11-A is shown as sub-assembled on the bottom of the housing, and then the sub-assembly dropped into the barrel of the housing and locked in.

Q. (By Mr. F. W. Lyon): From which end of the housing would the sub-assembly be inserted?

A. From the top end.

The Court: That is very clear to the court, that you can't put it any other place. There have been a lot of questions by counsel on both sides which are very clear.

Mr. F. W. Lyon: That is all, your Honor. [242]

Mr. Mason: That is all.

Mr. F. W. Lyon: May I offer this last sketch in

(Testimony of John D. Hackstaff.)

evidence as defendant's next in number? Also, I believe we failed to put in those last two exhibits.

The Clerk: This will be Exhibit M in evidence, this sketch.

Mr. Mason: I object to the sketch as being immaterial.

Mr. F. W. Lyon: It is merely to illustrate the witness' testimony.

The Court: It is not immaterial, counsel. It goes to the weight of it.

Mr. F. W. Lyon: When I wish to put in the other two drawings. Do you have those colored drawings?

The Clerk: No.

Mr. F. W. Lyon: I will offer the colored drawings of the Wallace Patent 2,364,408, as defendant's next in number.

The Court: In evidence.

The Clerk: That will be N.

Mr. F. W. Lyon: And the Wallace Patent 2,269,929 as defendant's next in number.

The Clerk: That will be O.

Mr. F. W. Lyon: That is all, your Honor, with this witness. I wish to call Mr. Finkle.

The Court: All right. Mr. Finkle, will you take the stand? [243]

GEORGE H. FINKLE

recalled as a witness by and on behalf of the defendant, having been previously duly sworn, was examined and testified further as follows:

Direct Examination

By Mr. F. W. Lyon:

Q. Mr. Finkle, what is the difference in time in assembling a solid-body type of clamp, such as shown in Exhibit 22, our Exhibit C, and Exhibit 11?

Mr. Mason: Is he basing that on his own experience?

Q. (By Mr. F. W. Lyon): On your own experience in your business?

A. Well, on Exhibit C or 22 actually we have found it to be a little faster.

Q. Can you tell why that is?

A. Well, we did not have the crimping operation that is necessary on Exhibit 11.

Q. In other words, you had extra operations, did you, on the cap type?

A. That's right.

Mr. Mason: May it be understood that my objection to this testimony as constituting an attack on the utility of the patent goes to this line of testimony?

The Court: Let the record so show.

Mr. F. W. Lyon: The witness previously identified a jig. [244]

Q. (By Mr. F. W. Lyon): This is that jig, is it? A. That's right.

(Testimony of George H. Finkle.)

Mr. F. W. Lyon: I would like to offer this in evidence as defendant's next in number.

The Court: In evidence.

The Clerk: That will be Defendant's Exhibit P.

Mr. F. W. Lyon: You may cross-examine.

Cross-Examination

By Mr. Mason:

Q. Mr. Finkle, you have made a demonstration in court of assembling a part of a clamp. You did not complete the clamp? A. No.

Q. You merely inserted two pins and a spreader through a hole in the body?

A. That's right.

Q. Do you know about how long it took you to do that?

A. Well, I know that I am much slower than the girl that is doing it all day long.

Q. As I understand it, you were a part of the F. & H. Manufacturing Company, which was the predecessor to the Wedgelock Company?

A. That's right.

Q. You assembled clamps in the manner you have demonstrated? [245] A. That's right.

Q. That company went into bankruptcy?

A. That's right.

Q. And Mr. Finkle, Donald Finkle, the present defendant, purchased the assets in bankruptcy?

A. That's right.

Q. You are now employed by Mr. Donald Finkle?

(Testimony of George H. Finkle.)

A. Well, I am now employed by the Wedglock Corporation.

Q. When did it become a corporation?

A. January 1, 1947, or 2nd.

The Court: Of this year?

The Witness: That's right.

Q. It is continuing the business that Mr. Finkle as the Wedglock Company had previously carried on? A. That's right.

Mr. Mason: Your Honor, please, I think I should move to file a supplemental bill, since the defendant has changed its status since the case was instituted here. I did not know about that.

The Court: An amendment will be allowed. There is no prejudice.

Mr. Mason: That is all.

Redirect Examination

By Mr. F. W. Lyon:

Q. Just one question: How many fasteners of any type [246] can a girl assemble in an ordinary eight-hour day?

A. Well, the operations are slightly different. The stringing operation which I demonstrated, the insertion of the two center wires with a spreader on the jig, like Exhibit P, we call that a stringing operation, and they will do around 3,000 units a day.

The Court: How many girls would finish them?

The Witness: We have a very small crew now.

(Testimony of George H. Finkle.)

The Court: How many will one girl finish?

The Witness: 3,000.

The Court: Oh, that was one.

Q. (By Mr. F. W. Lyon): How many can they make of the type of Exhibit 11 in a day?

A. Well, the clamping operation there, which is the taking of what we call the string unit, which is composed of the two center wires and a washer, then the adding of the spring, one or two washers on the bottom cup and spreader, they will do 2,000 or less, depending upon the dexterity of the girl.

Q. That 3,000 figure which you gave was completely assembling a clamp such as Exhibit C, I think it is?

A. No. That was just the stringing operation, which I demonstrated here, the insertion of the center wires.

Q. How long would it take to completely assemble the clamp? How many could they complete in a day? [247]

A. The other, the final clamping operation, that is the compressing of the spring and putting on the cap and inserting the top spreader, I think they do around a thousand a day in eight hours; 1,000 to 1,500. I would have to verify that.

Q. In other words, the positioning of the spreader and pins in the device is a very rapid operation compared to the final locking up operation of compressing the spring?

A. That's right.

Mr. F. W. Lyon: That is all.

(Testimony of George H. Finkle.)

Recross-Examination

By Mr. Mason:

Q. Now, just what operation do you include in what you call the stringing operation, which I believe is the operation you said the girl could do 3,000 in a day?

A. That is in taking up the two center wires and inserting it in the jig, placing the T between the center wires and slipping the body over that unit and extracting it from the unit and laying it in the tray. That is it.

Q. In other words, just the operation which you performed this afternoon? A. That's right.

Q. Now, in this other operation relating to Exhibit 11, just what did you say that the girl would do in doing 2,000?

A. Well, she has the unit of the two center wires here, together with one washer. She puts that into a clamp, a clamp [248] that is capable of compressing the spring. She lays on the spring, then a washer, then inserts—no, pardon me—then she compresses the spring, which leaves an opening that the T can be inserted into, and then a washer is placed on and then the cap placed on and the unit released.

Q. That is a much more complete operation than this stringing operation? A. That's right.

Q. How many hours a day do they work?

A. Well, it is an eight-hour day. They do have 20 minutes of rest period.

(Testimony of George H. Finkle.)

Q. Are you testifying as to what an expert operator would do, or just an ordinary operator?

A. I am talking about an expert operator.

Q. Have you kept any shop records on that?

A. We have.

Q. Do you have those with you, do you?

A. No.

Mr. Mason: That is all.

Redirect Examination

By Mr. F. W. Lyon:

Q. After you have made up this sub-assembly, to finish the clamp you have to have another operation?

A. That is right.

Q. That is all? [249]

A. We have two other operations.

Q. What are those?

A. Well, we have to insert the sub-assembly into the body; that is as in Exhibit 11. We would insert the plunger or thimble-shaped unit, and then we would insert the sub-assembly. Then it is taken over and is crimped. The assembly is one operation and the crimping is another.

Mr. F. W. Lyon: That is all.

Mr. Mason: That is all.

The Court: That is all.

(Witness excused.)

Mr. F. W. Lyon: That is all we have.

The Court: Do both sides rest?

Mr. Mason: I would like to ask Mr. Mattingly a few questions, please.

The Court: Stay right where you are. I think he can answer the few questions from right there.

HAROLD W. MATTINGLY

recalled as a witness by and on behalf of the plaintiffs, having been previously duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Mason:

Q. Mr. Mattingly, will you refer to the Webb Patent 2,256,634, Exhibit H-8, and state whether or not from your [250] examination of this patent you can tell whether or not if the flange which holds the member 17 and the top of the body were to yield, allowing the member 16 to escape, would there be anything to prevent the pins 22 from escaping from the body?

A. No, sir, there would be nothing to prevent them escaping from the body. The pins and spring would immediately be ejected from the body by the spring.

Q. In other words, the lower end portion of the pins could escape through the opening in this lower member of the bottom of the body?

A. That is correct. The hole 34 through the ring 24 must be large enough to pass the hooked ends of the pins 22 even when they are spread by the cams 32. Otherwise it would be impossible to initially assemble this clamp.

(Testimony of Harold Mattingly.)

Q. And there would not be any lock, as provided by Wallace Patent '408?

A. No, the double lock we referred to comprised—the first lock was the engagement of the engaging ends of the pins with the outer end of the body or the outer surface of the cap, and that is not present in the Webb patent at all. The only lock in the Webb patent is the inner engagement of the flanges of the member 16 and the lips 15 on the body.

Q. Now, in Patent '408, referring to Exhibit 19, isn't it true that the headed ends of pins 20 engage the end cap simultaneously with the engagement of flange 33 with shoulder [251] 16?

A. That is the way it is illustrated in Patent '408.

Q. So that those two stopping elements operate to provide the common function of effecting a double stop?

A. That is correct.

Q. Now, will you refer to Wallace Patent '498, which is the last one we offered in evidence——

The Court: Exhibit 23.

Q. (By Mr. Mason): ——Exhibit 23, and compare that with Wallace Patent '929 and state whether insofar as the cap and spreader assembly of those patents relate to the cap and spreader assembly of Patent '408 there is any material difference.

A. There is no material difference between the cap and spreader and body assembly in Exhibit 23 from that which is shown in Exhibit H-11.

(Testimony of Harold Mattingly.)

The cap serves the function of holding the spreader on the assembly in position to project its stem between the ends of the pins, the projecting ends of the pins, and the opposite side of the spreader abuts against the end wall structure, which is the equivalent of the washer 9—I beg your pardon—it is the equivalent to the end wall structure indicated at 7 in Exhibit H-11. The two assemblies, insofar as the spreader, body and cap are concerned function exactly alike and are constructed exactly alike.

Q. And this patent, Exhibit 23, was cited against the [252] application for the Patent '408, and considered by the Patent Office?

A. It was.

Mr. Mason: That is all.

Mr. F. W. Lyon: I have no cross-examination.

(Witness excused.)

Mr. Mason: Now, I believe there are one or two exhibits, your Honor, which were marked for identification and which have not been offered in evidence. I refer particularly to the catalog, which was referred to quite considerably, and I think it probably should be in evidence.

The Court: It helps the court a little. Of course, I recall Mr. Lyon's statement that it was published a considerable time after.

Mr. Mason: We are not offering it to show the date of invention, but merely as illustrative of the testimony.

The Court: Yes. I saw something in there, I recall.

The Clerk: Exhibit 8 in evidence.

Mr. F. W. Lyon: Your Honor, if there are any exhibits which were identified and not introduced, I will stipulate that any of them may be considered offered in evidence.

Mr. Mason: That is satisfactory.

The Court: All of those exhibits heretofore identified and not received will now be received in evidence.

* * * * *

[Endorsed]: No. 11761. United States Circuit Court of Appeals for the Ninth Circuit. Herman H. Helbush and Monogram Manufacturing Co., a corporation, Appellants, vs. Donald H. Finkle, doing business as Wedgelock Company, Appellee. Transcript of Record. Upon Appeal from the District Court of the United States for the Southern District of California, Central Division.

Filed October 17, 1947.

/s/ PAUL P. O'BRIEN

Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

In the United States Circuit Court of Appeals
for the Ninth Circuit

No. 11761

HERMAN H. HELBUSH and MONOGRAM
MANUFACTURING CO., a corporation,
Plaintifffs,

vs.

DONALD H. FINKLE, doing business as
WEDGELOCK COMPANY,
Defendants.

APPELLANTS' CONCISE STATEMENT OF
POINTS ON APPEAL UNDER RULE 19 (6)

Plaintiffs-appellants make the following statement of the points on which they intend to rely on the appeal:

1. The Trial Court erred in failing to make findings of fact to support the judgment of non-infringement.

2. The Trial Court erred in failing to make findings of fact in accordance with the evidence.

3. The Trial Court erred in holding that defendants have not infringed claim 11 of Patent 2,365,787.

4. The Trial Court erred in holding that defendants have not infringed claims 1 and 2 of Patent 2,364,408.

5. The Trial Court erred in failing to apply the law of patent claim interpretation as stated by the Court in *Reinharts vs. Caterpillar Tractor Co.*, and by the Supreme Court in *Smith vs. Snow*.

6. The Trial Court erred, with respect to claim 11 of Patent 2,365,787, in reading into the claim an element not recited in the claim, and not necessary to novelty or operability.

7. The Trial Court erred, with respect to claims 1 and 2 of Patent 2,364,408, in reading into the claims an element not recited in the claims, which the claims expressly preclude, which is not necessary to novelty or operability and, most important, which is not even included in the specific disclosure of the patent drawings and specification.

8. The Trial Court erred in failing to apply the law of mechanical equivalence.

9. The Trial Court erred in holding that defendants avoided infringement by the simple expedient of calling an equivalent part by a different name.

10. The Trial Court erred in awarding attorneys' fees to defendants when there was no charge or showing of bad faith on the part of plaintiffs and when, according to the terms of the patent grants there was every valid reason for plaintiffs to believe defendants infringe.

11. The Trial Court erred in failing to hold claim 11 of Patent 2,365,787 valid and infringed.

12. The Trial Court erred in failing to hold claims 1 and 2 of Patent 2,364,408 valid and infringed.

Dated this 8th day of October, 1947.

MASON & GRAHAM,
/s/ COLLINS MASON,
Attorneys for Plaintiffs-Appellants.

Received copy of the within Statement this 9th day of 1947.

/s/ FREDERICK W. LYON,
Attorneys for Defendants.

[Endorsed]: Filed Oct. 7, 1947.

[Title of Circuit Court of Appeals and Cause.]

STIPULATION AMENDING APPELLANTS'
DESIGNATION OF PORTIONS OF REC-
ORD ON APPEAL UNDER RULE 19 (6)

It Is Hereby Stipulated by and between the parties to this action that appellants' designation of portions of record on appeal under Rule 19 (6) shall be amended to include, in Item 21 thereof, defendants' Exhibit H-8, being United States Letters Patent No. 2,256,634, and that this stipulation shall be included in the printed record on appeal.

Dated this 17th day of December, 1947.

MASON & GRAHAM,
/s/ COLLINS MASON,
Attorneys for Plaintiffs-
Appellants.

LYON & LYON,
/s/ FREDERICK W. LYON,
Attorneys for Defendants-
Appellees.

It Is So Ordered:

/s/ FRANCIS A. GARRECHT,
Judge of the U. S. Circuit
Court of Appeals.

[Endorsed]: Filed Dec. 19, 1947.
